1738

Libelant's Exhibit 1.

Name of Vessel	*Portmar*
Official Number	219283
Flag	U. S. A.
Type of Vessel	General Cargo Carrier
Steel or Wood Hull	Steel
	Single Screw
Year Built	1919
Place Built	Portland
1739 Classed	A1—Lloyds
When (Classed)	1919
Propulsive Equipment	Direct
(All Steam)	Recip.
Type of Fuel	Oil
Registered Tonnage—Gross	5,550
" " Net	3,418
Length B. P.	409.8′
Breadth	54.2′
Depth	27.7′
1740 Deadweight (Tons 2240 lbs.)	8,600
Permanent Bunkers (Bbls.)	12,927
Draft on Summer Freeboard	24′-0″
Cargo Capacity—Cu. Ft.	428,116
Speed Knots Fully Loaded	11.0
Fuel Consumption—Bbls.	223

Libelant's Exhibit 2.

1741

AMERICAN BUREAU OF SHIPPING

Certificate No. D. S. 2 R. 148 Port of New York
G. O. No. 10 Sup. No. 2

Date April 25th, 1944.

THIS IS TO CERTIFY THAT the *Portmar*, Official Number 219,283, in conformity with the International Load Line Convention, 1930, has been assigned a Summer Freeboard amidships of 6 feet, 5 inches, which corresponds to a Mean Summer Extreme Draft to the bottom of keel Butt straps 1742
of 24 feet, 0 inches, and THAT, from an examination of the plans and characteristics recorded in this Bureau's files and of the survey reports of all pertinent changes in the Vessel's construction since built (excluding, however, weight added by installation of refrigerated capacity, arming, degaussing, demagnetizing, or the installation of splinter-protection equipment or because of ice-strengthening, or other installation or equipment required by the Administrator, War Shipping Administration, the United States Maritime Commission, the Army, or the Navy), the Vessel's deadweight capacity for cargo, fresh water, stores and Permanent Bunkers in the foregoing condition is 8600 1743
tons (of 2240 pounds).

THIS IS TO CERTIFY FURTHER THAT the Vessel's speed as computed in accordance with General Order No. 10 of the War Shipping Administration is 10.5 knots.

THIS IS TO CERTIFY FURTHER THAT as recorded in this Bureau's files the Vessel has refrigerated space available for cargo of ..... cubic feet.

AMERICAN BUREAU OF SHIPPING

By: J W CANTILLION
Title: Secretary

1744

Libelant's Exhibit 3.

Round voyage charter of SS. *Portmar*. Printed as Exhibit A of Calmar's Libel against United States (pp. 18 to 38).

Libelant's Exhibit 4.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

1745

CALMAR STEAMSHIP CORPORATION,
Libelant,

against

SYDNEY KEITH SCOTT, one of the Lloyd's underwriters, and EDINBURGH ASSURANCE CO., LTD. *et al.*,
Respondents.

A. 133-332.

1746

IT IS HEREBY STIPULATED that the documents annexed hereto are true copies of the original documents described below, and may be offered in evidence without further proof, by either party hereto, in lieu of said original documents:

1. Slips binding war risks insurance on SS. *Portmar* with notations as to the amounts subscribed and initialed by or on behalf of the several respondents herein.

2. Cable of January 24, 1942 from Mather Co. to Thomas Stephens Son, initialed by or on behalf of the several respondents herein.

Libelant's Exhibit 4. 1747

3. Letter of April 8, 1942 from Thomas Stephens & Sons, Ltd., to Lloyd's Underwriters on policy No. D41/11356, with notation agreeing to the second paragraph initialed by or on behalf of the several Underwriters, respondents herein.

4. Letter of April 8, 1942 from Thomas Stephens & Sons, Ltd., to the companies on combined policy No. D41/11356, with notation agreeing to the second paragraph initialed by or on behalf of the several companies, except Excess Insurance Co., Ltd., respondents herein. 1748

5. Letter of April 9, 1942 from Excess Insurance Company, Ltd., to Thomas Stephens & Sons, Ltd.

6. Letter of January 8, 1943 from Thomas Stephens & Sons, Ltd., to Messrs. Mather & Company initialed by or on behalf of the several respondents herein.

Dated, New York, New York, November 1, 1950.

KIRLIN, CAMPBELL, HICKOX & KEATING,
Proctors for Libelant. 1749

MENDES & MOUNT,
Proctors for Respondents.

1750 *Libelant's Exhibit 4.*

1137 D41/11356

U. S.
DOLLAR
A/C

THOS. STEPHENS & SONS, LTD.,

$860,000.

$714,000. L
116,000. Cos.
30,000. E.

1751 "PORTMAR" /S/

U. S. Pacific

Philippines and return to U. S. Pacific and/or U. S. Atlantic and 15 days

via port or ports any order.

$860,000.

HULL AND MACHINERY valued ~~$800,000~~.

1752 Against war, s.r. c.c. and m.d.
~~Inst. or~~ Ameri an Clauses
Undrs. pay tax
N. Y. S. Cl.

1½%

~~less 1/4th% no U. S. Atlantic~~

Slg. on or before 5th December or h/c

GG/EM

26/11/41

(Here follow the initials of Roy J. M. Merrett and most of the Respondent Underwriters with the several amounts of the insurance taken by them respectively.)

Libelant's Exhibit 4.

1753

1138

D41/11356

U. S.
DOLLAR
A/C

THOS. STEPHENS & SONS, LTD.,

$860,000.

Calmar S. S. Corporation

"PORTMAR" /S/ 1754

U. S. Pacific to at and from Philippines and return to U. S. Pacific &/or Atlantic port or ports and 15 days via port or ports in any order.

$860,000.

HULL & MACHINERY valued ~~$800,000~~.

Against war, s.r. & c.c. and m.d. 1755
~~Institute or~~ American Clauses.
N. Y. S. Cl.
Undrs. pay tax

1½%

As main slip.

27/11/41

Sailing 5th Dec. ~~or h/c~~

(Here follow the initials of the remaining Respondent Underwriters with the several amounts of the insurance taken by them respectively.)

1756 *Libelant's Exhibit 4.*

[WESTERN UNION CABLEGRAM]

25 JAN 1942

1942 JAN 24 P 10 27
RECEIVED
26 JAN 1942
Ansd.....

477 PHILADELPHIA PENN 25 24
NLT THOMAS STEPHENS SONS
FIFTYTWO CORNHILL LDN

1757

PORTMAR DIVERTED TO AUSTRALIA ON OUTWARD VOYAGE UNDER GOVERNMENT ORDERS. STOP HOLD COVERED PENDING FURTHER ADVICES
[redacted] MATHER CO

PASSED
BY
CENSOR
NO. 2446

642

(Here follow the initials of Roy J. M. Merrett and all other respondent underwriters.)

1758

1759

Libelant's Exhibit 4.

THOS. STEPHENS & SONS, LTD.
Insurance Brokers
52, Cornhill, E. C. 3.
and at Lloyd's, E. C. 3.

Directors:
E. R. Turner.
P. S. Stephens.
Harold W. Stephens.
E. G. W. Stephens

Telegrams { Inland "Stephens, Stock, London."
Foreign "Stephens, London."

Telephones: MANsion House 8964 (6 Lines).

All Communications to Be Addressed to the Firm

1760

London, 8th April 1942

To Underwriters on Policy No. D41/11356,
Lloyd's,
E.C. 3.

Dear Sirs,

Calmar Steamship Corporation. "*Portmar*" s.s.
at Port Darwin, Australia.

We have been instructed by the assured to tender abandonment to you of their interest in the above vessel.

1761

In the event that you decline to accept such abandonment we shall be pleased to hear that you agree to place the insured in the same position as if a writ had been issued.

Agreed

Yours truly,

THOS. STEPHENS & SONS LTD.

H. STEPHENS
Director.

(The word "agreed" in the margin above opposite the second paragraph is in longhand followed by the initials or signatures on said letter and three succeeding pages, of Roy J. M. Merrett and of all the other respondent underwriters on the Lloyd's policy.)

1762 *Libelant's Exhibit 4.*

THOS. STEPHENS & SONS, LTD.
Insurance Brokers
52, Cornhill, E. C. 3.
and at Lloyd's, E. C. 3.

Directors:
E. R. Turner.
P. S. Stephens.
Harold W. Stephens.
E. G. W. Stephens

Telegrams { Inland "Stephens, Stock, London."
Foreign "Stephens, London."

Telephones: MANsion House 8964 (6 Lines).

All Communications to Be Addressed to the Firm

London, 8th April, 1942.

1763 To the Companies on Combined Policy No. D41/11356,
E. C. 3.

Dear Sirs,

CALMAR STEAMSHIP CORPORATION. *"Portmar" s.s.*
AT PORT DARWIN, AUSTRALIA.

We have been instructed by the assured to tender abandonment to you of their interest in the above vessel.

In the event that you decline to accept such abandonment we shall be pleased to hear that you agree to place the insured in the same position as if a writ had been issued.

1764 Yours truly,

THOS. STEPHENS & SONS LTD.

H. STEPHENS
Director.

$30000.	Edinburgh Assurance Co. Ltd.	
30000.	Phoenix Assurance Co. Ltd. Group D	Decline but give benefit of Writ Clause
20000.	Fine Art & General Ins. Co. Ltd.	
16000.	British Law Insurance Co. Ltd.	
4000.	Planet Insurance Co. Ltd.	
2000.	Elders Insurance Co. Ltd.	
14000.	National Provincial Ins. Co. Ltd.	

HW/VW

(The words "Decline but give benefit of Writ Clause" are in longhand, followed by the initials in longhand on behalf of the said seven Institute Companies on the combined Institute Companies policy.)

Libelant's Exhibit 4. 1765

EXCESS INSURANCE COMPANY LIMITED.
40 ~~50-51~~, Lime Street,

Telephone No.
Mansion House 0747.
Telegraphic Address,
"Exmodep, Stock, London."

London, 9th April, 1942.
E. C. 3.

JMB/JMP.

Messrs. Thos. Stephens & Sons, Ltd.,
52, Cornhill,
E. C. 3. 1766

Dear Sirs,

"Portmar" s.s.

We thank you for your letter of the 8th instant giving notice of the Assured's wish to abandon their interest in the above vessel to the various Underwriters and Companies concerned.

This letter is formally to decline such abandonment on behalf of this Company, and at the same time to agree to place the Insured in the same position as if a writ had already been issued. 1767

Yours faithfully,

JOHN M. BALLARDS.
For EXCESS INSURANCE COMPANY LIMITED.

1768 *Libelant's Exhibit 4.*

PER NORTH ATLANTIC AIR SERVICE.
Cl.

Posted 8/1/43. 8th January, 43.

Messrs. Mather & Company,
PHILADELPHIA.

Dear Sirs,

1769 Calmar S/S Corporation.

S/S "*Portmar*".

Hull—War Risk Insurance.

Referring to previous correspondence.

Underwriters inform us that they have given further very careful consideration to this case and have taken legal opinion on the facts, and they now ask us to state their conclusions as follows.

The facts disclose that after arrival in Australia the vessel discharged her outward cargo and thereafter operated under the orders of the military authorities.

1770 It was in the course of these operations, on a series of local voyages to & from Port Darwin, that she became a casualty. These voyages were not even performed as a result of the Owners' decision and quite clearly represented an entirely fresh series of adventures which can by no stretch of imagination be considered as having anything whatever to do with the venture originally insured or with the extension of the insurance to cover the diversion of the vessel to Australia.

Whether it be held that Underwriters' liability terminated on arrival of the vessel in Australia or when she discharged her outward cargo or when she was ordered into service by the military authorities seems immaterial

Libelant's Exhibit 4.

1771

for, whichever it be, they are definitely persuaded that all liability under their policies had terminated prior to the casualty. They therefore ask us to make it clear that they must, with regret, finally decline any liability in connection with this loss.

Speaking for ourselves, we have the greatest sympathy for your friends in the situation in which they are placed but it does seem to us that, on the facts, they should be able to establish the liability of the W. S. A. &/or the Australian Authorities and we earnestly hope that they may succeed in obtaining recognition of this liability without further delay.

1772

Yours truly,

THOS. STEPHENS & SONS, LTD.

Director.

(Here follow the initials of Roy J. M. Merrett and of all the respondent underwriters showing they approved the above letter.)

1773

1774

Libelant's Exhibit 5.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
Libelant,

against

SYDNEY KEITH SCOTT one of the Lloyd's underwriters, and EDINBURGH ASSURANCE CO., LTD. *et al.*
Respondents.

A. 133-332.

1775

IT IS HEREBY STIPULATED that the attached documents may be offered in evidence without further proof by either party.

Dated, New York, New York, November 6, 1950.

KIRLIN, CAMPBELL, HICKOX & KEATING,
Proctors for Libelant.

1776

MENDES & MOUNT,
Proctors for Respondents.

Libelant's Exhibit 5. 1777

THOS. STEPHENS & SONS, LTD.
Insurance Brokers.
52, Cornhill, E. C. 3.
and at Lloyd's, E. C. 3.

Directors:
E. R. Turner.
P. S. Stephens.
Harold W. Stephens.
E. G. W. Stephens

Telegrams { Inland "Stephens, Stock, London."
Foreign "Stephens, London."

Telephones: MANsion House 8964 (6 lines).

All Communications to Be Addressed to the Firm

1778

London, 6th February, 1942

W.

Posted 9/2/42.

Messers. Mather & Co.,
226, Walnut Street,
Philadelphia, U. S. A.

RECEIVED
HULL
MAR — 9 1942
DEPT.
MATHER & CO.

Dear Sirs,

Calmar S/S Corporation.
Portmar /S/. Hull War Risk Insurance. 1779

We have your cable of the 24th January last, advising that this vessel insured for the voyages from U. S. Pacific ports to the Philippines and return to U. S. has been diverted to Australia on the outward voyage under Government orders.

We confirm that all Underwriters on our War Risk Policy have agreed to hold this diversion covered pending your further advices.

Yours truly,

THOS. STEPHENS & SONS, LTD.

H. STEPHENS,
Director.

HS/OD.

1780 *Libelant's Exhibit 5.*

[Western Union Cablegram]

NEW YORK APRIL 7TH 1942.

NLT

THOMAS STEPHENS SONS.
52 CORNHILL LONDON.

ONE HUNDRED ELEVEN CALMAR STEAMSHIP CORPORATION REQUEST YOU GIVE NOTICE ABANDONMENT THEIR INTEREST IN PORTMAR TO WAR RISK UNDERWRITERS ACCOUNT DESTRUCTION PORTMAR PORT DARWIN AUSTRALIA. STOP PLEASE REPLY PHILA-
1781 DELPHIA.

MATHER LTD.

[Western Union Cablegram]

CDV 387 CABLE=LONDON 13 8 624P

1942 APR 8 PM4 16

LC MATHER CO.
226 WALNUTST PHILA.

PORTMAR TENDERING ABANDONMENT
THOMAS STEPHENS SONS LIMITED.
1782 226.

[Western Union Cablegram]

CDV418 CABLE=LONDON 30 9/ 617P

1942 APR 9 PM5 17

LC MATHER CO.
226 WALNUTST PHILA.

PORTMAR HAVE TENDERED ABANDONMENT TO UNDERWRITERS WHO DECLINE ACCEPT BUT AGREE ASSURED SAME POSITION AS IF WRITS ISSUED EIGHTH APRIL.
THOMAS STEPHENS SONS LIMITED.
226.

Libelant's Exhibit 5. 1783

THE HIGH COURT OF AUSTRALIA
IN ADMIRALTY

No. 24.

BETWEEN:

UNITED SALVAGE PROPRIETARY LIMITED and JOHN PROTHEROE WILLIAMS,

Plaintiffs,

1784

and

THE SHIP *"Portmar"*

Defendant.

THE 19TH DAY OF NOVEMBER 1943

This action having on the 26th, 27th, 28th and 29th days of October 1943 and the 1st and 2nd days of November 1943 been tried before His Honour Mr. Justice Starke and His Honour on the 19th day of November 1943 having awarded the plaintiffs the sum of £5,000 for salvage services rendered by the plaintiffs to the ship *"Portmar"* IT IS THIS DAY ADJUDGED that the plaintiffs recover from Calmar Steamship Corporation the owner of the said ship the sum of £5,000 and costs to be taxed. 1785

J. G. HARDMAN,
Principal Registrar.

(L. S.)

1786 *Libelant's Exhibit 5.*

The above costs have been taxed and allowed at the sum of £1156.9.9 as appears by the Taxing Officer's Certificate dated the 17th day of December 1943.

I CERTIFY that the above is a true copy of the Judgment of the High Court of Australia in the abovementioned matter.

DATED the 23rd day of March, 1950.

1787 J. G. HARDMAN,
Principal Registrar.

(L. S.)

(Then follows certification of signature of J. G. Hardman by a Vice Consul of the United States.)

THE HIGH COURT OF AUSTRALIA
IN ADMIRALTY

No. 24.

1788 BETWEEN:

UNITED SALVAGE PROPRIETARY LIMITED and JOHN PROTHEROE WILLIAMS,

Plaintiffs,

and

THE SHIP *"Portmar"*

Defendant.

I, FRANCIS GREGORY MURPHY of 406 Collins Street Melbourne in the State of Victoria Australia Managing Law Clerk make oath and say:—

1. THAT I am Managing Law Clerk in the employ of Messrs. Madden Butler Elder & Graham the solicitors for the above named Plaintiffs and I had the conduct of the above action under the supervision of my said principals.

Libelant's Exhibit 5.

2. THAT the said Plaintiffs recovered against the Calmar Steamship Corporation the sum of £5,000 with costs to be taxed which costs were duly taxed and allowed at the sum of £1156.9.9 in respect of the said action

3. THAT the said sums of £5,000 and £1,156.9.9 were duly received by the said Madden Butler Elder & Graham as solicitors for the said Plaintiffs by the withdrawal from Court on the 1st day of December 1943 of the sum of £500 paid into Court by Malleson Stewart Stawell & Nankivell the solicitors for the said Calmar Steamship Corporation and by the payment of the sum of £5,656.9.9 by the said Malleson Stewart Stawell & Nankivell to the said Madden Butler Elder & Graham on the 9th day of February, 1944.

F G MURPHY

SWORN at Melbourne in the State of Victoria this 24th day of March, 1950.

Before me,

J. S. ELDER
Notary Public
Melbourne.

(SEAL)

(Then follows certification of signature of J. S. Elder by a Vice Consul of the United States.)

1792

Libelant's Exhibit 6.

Lloyd's War Risk Insurance policy on SS *Portmar* in the sum of $714,000 printed as Schedule A of Calmar's libel against Underwriters (p. 70).

Libelant's Exhibit 7.

Institute of London Underwriters War Risk Insurance policy on SS *Portmar* in the sum of $116,000. To be sepa-
1793 rately submitted to the Court.

Libelant's Exhibit 8.

Excess Insurance Co. Ltd's. War Risk Insurance policy on SS *Portmar* in the sum of $30,000. To be separately submitted to the Court.

Libelant's Exhibit 9.

1794

November 26, 1941
INS—*Portmar*—Voy. 39F

Mr. B. K. Ogden, Director
Division of Insurance
United States Maritime Commission
Washington, D. C.

SS. *Portmar* Voy. 39F

Dear Sir:

This will confirm telephonic conversation of November 25, 1941 between the writer and yourself at which time you were advised of the following rate quotations covering the various forms of war risk insurance for Charter's account

on one round voyage of our SS *Portmar* from United States Pacific port or ports to port or ports in the Philippine Islands, returning to United States North Atlantic via the Pacific Ocean and the Panama Canal.

1 —War Risk Insurance on Vessel based on valuation of $860,000.

(a) U. S. Market — (120 days voyage limit) quotes 1¾%

(b) London Market—(no time limit for voyage) limit quotes..... 1½% 1796

2A—War Risk on Life and Personal Injury of Officers and Crews based on a total of 35 men @ $5,000. per man—$175,000.

(a) U. S. Market (120 days voyage limit) quotes 1⅛%

(b) London Market (no time limit for voyage) quotes 9/16%

B—War Risk on Personal Effects Officers and Crews based on 8 officers and 1 radio operator 1797

@ $500. ..... $4500.

and 26 unlicensed members @ $150. ..... 3900.

Total ..... $8400.

(a) U. S. Market (120 days voyage limit) quotes 1⅜%

(b) London Market (no time limit for voyage) quotes 1½%

C—Slop Chest—$1000.00

(a) U. S. Market (No time limit for voyage) quotes 1%

1834 *Libelant's Trial Exhibit 20.*

which have been dated back. The Mate will explain this more fully.

In the log book I had listed James Freshour, the bearer of this, as a deserter. I did not then know that he was put in the hospital with an injured ankle. I ask you to have his name taken off the deserters list.

I hope you will excuse this rambling letter but I have tried to get as much information in as possible and I must now get Freshour ready and get his papers in order so that he can leave at daybreak.

1835 The lawyers which I have retained is one of the oldest and most respected firms in town and I have full confidence in their integrity. They were pointed out to me by the Agent and Consul but for my own satisfaction I also saw Capt. Cansey the U. S. Naval Attache.

I just notice in the papers that Sir Owen Dixon has been appointed Australian Minister to Washington.

It was impossible for me for a long time to get in touch with you under our proper address and I had in order to get in touch with you to send my wires through Bethlehem. This was not my fault but nobody would take my word for anything. I believe they will now and in the future.

1836 Yours very respectfully,

(Sgd.) AXEL MICHELSON

Libelant's Deposition Exhibit 22.

[WESTERN UNION TELEGRAM]

FY128 D24CDC 9M 90 VIA RCA

F MELBOURNE 1750 APR 20 1942

CALMAR STEAMSHIP CORP.
25 BROADWAY NYK

YOURS SIXTEENTH RECEIVED UNDERSTAND SALVAGE AUTHORISED BY AMERICAN ARMY STOP ARMY CLAIMS OWNERSHIP VESSEL STOP SOLICITORS ADVISE CLAIM

1798 *Libelant's Exhibit 9.*

(b) London Market (no time limit for voyage) quotes 1½%

3A—War Risk Protection & Indemnity including expenses incurred account contractual repatriation but not including wages and bonuses.

(a) U. S. Underwriters have declined to quote as they do not carry our ordinary P & I insurance.

(b) London Market (no time limit for voyage) quotes 23.1¢ per $100. on a valuation of $860,000.

1799

B—On Wages and Bonuses until repatriated, estimated to be about $8000, per month.

(a) U. S. Underwriters have declined to quote for same reason as above.

(b) London (no time limit on voyage) quotes as follows:

6 months wages, etc.	@	8000.—	$ 48,000.	@ 1½%
12 " " "		8000.	96,000.	1⅛%
1800 18 " " "		8000.	144,000.	⅞%
24 " " "		8000.	192,000.	¾%

The rates quoted above by London underwriters are subject to a discount of 7% and to an additional charge to cover the British Stamp Tax.

With your approval we have arranged coverage in London through our Insurance Brokers, Messrs. Mather & Company, of Philadelphia for items numbered one and two above. We have used in item one the valuation of $860,000. which is about $100.00 per deadweight ton. You informed us you thought that valuation was reasonable but could not definitely authorize. We thereupon contacted the Emergency Division for the approved figure but before this could

be obtained had to cable London to close as the ***Portmar*** was scheduled to sail today from San Francisco. We trust the Maritime Commission will approve the valuation of $860,000.

You have also authorized us to place the War Risk Protection and Indemnity insurance and the insurance on Wages and Bonuses until repatriated, Items 3A and 3B above, with the Insurance Fund of the Bethlehem Steel Corporation, which Bethlehem agrees to cover at premiums quoted by London Underwriters above. It is also understood that we are to cover for 12 months wages and bonuses only under Item 3B, but that the Maritime Commission will be responsible for any additional wages and bonuses in the event that liability for more than 1 year's wages and bonuses is incurred.

It is understood that should the voyage of the vessel be altered or changed by the charterer any additional premiums required by underwriters shall be for the account of the charterer.

Very truly yours,

CALMAR STEAMSHIP CORPORATION,

(Sgd.) H. W. Warley
President

c/r-GD-PORTMAR-VOY. 39F

1804

Libelant's Exhibit 10.

UNITED STATES MARITIME COMMISSION
Washington

February 20, 1942

Calmar Steamship Corporation
25 Broadway
New York, New York

Attention: Mr. H. W. Warley

Gentlemen:

1805 *SS Portmar*

We acknowledge receipt of your letter of February 3, your reference No. INS—*Portmar*—VOY. 39 F, and you are advised that the premium voucher, statement and receipted bills of Mather & Co. and Bethlehem Steel Corporation have been checked each with the other and with the time charter dated November 21, 1941, Contract MCc-1915, found in order, and passed on today for payment.

You are also advised for your record and file that the amount of premium bills is $38,073.87.

1806 Very truly yours,

B. K. OGDEN
Director, Division of Insurance

By: J. F. DELANEY

J. F. DELANEY, Chief
Insurance Policy Examining Section

1807

Libelant's Trial Exhibit 12.

Libelant's Deposition Exhibit 15.

[POSTAL TELEGRAPH]

LB156N 42 CABLE VIA IMPL=MELBOURNE 1 1446
FOR CALMAR=

1942 APR 1 AM 9 07

BETHLEHEM STEEL CORPN NEWYORK (BG)=
DIVERTED FROM MANILA TO SUVA ARRIVING TWENTIETH DECEMBER THENCE SYDNEY THIRTIETH DECEMBER BRISBANE FIFTH JANUARY DARWIN 1808
NINETEENTH JANUARY WYNDHAM EIGHTH FEBRUARY DARWIN TWELFTH FEBRUARY THENCE KOEPANG WHILST PROCEEDING INSTRUCTED RETURN DARWIN ARRIVING NINETEENTH FEBRUARY=

AXEL MICHELSON.
SUVA WYNDHEM KOEPENG.

Libelant's Exhibit 13.

[POSTAL TELEGRAPH]

LL FEB 23 PM 6.06 1809

N.WD277 33 GOVT=DC WASHINGTON DC 23 525P

CALMAR STEAMSHIP CORPORATION=
25 BROADWAY NEWYORK NY=

REGRET TO ADVISE YOUR STEAMER PORTMAR HAS BEEN REPORTED THROUGH BRITISH CHANNELS TO HAVE BEEN DAMAGED IN AIRRAID AT PORTDARWIN. EXTENT OF DAMAGE AND FURTHER DETAILS UNKNOWN. PLEASE FURNISH CREW LIST THIS OFFICE=
I M HOLT WAR SHIPPING ADMINISTRATION. (56).

1810

Libelant's Trial Exhibit 14.

Libelant's Deposition Exhibit 11.

[Postal Telegraph]

LA536N 39 IMP XCI=MELBOURNE 24 1855=

1942 MAR 24 PM 2.08

FOR CALMAR=

BETHLEHEM STEEL CORPN 25 BROADWAY NYC (BG)=
SHIP ACCESSIBLE HALF LENGTH AT LOW TIDE MY
1811 OPINION EXCESSIVE DAMAGE MAKES SALVAGE IMPOS-
SIBLE STOP HAVE YOU ANY INSTRUCTIONS I SHOULD
FOLLOW TO PROTECT OWNERS INTERESTS=

AXEL MICHELSON/CARE DALGETY CO

(40).

Libelant's Exhibit 15.

[Postal Telegraph]

1942 MAR 23 PM 2 47

TK76N 52 IMP MELBOURNE 23 2200

1812 FOR CALMAR BETHLEHEM STEEL CORPN=
25 BROADWAY NEWYORK (BG)=SUBJECT TO
CORRECTION

WITH EXCEPTION THOMAS TYRRELL AB NOW DE-
CEASED ALL CREW PERSONNEL SAFE AND RETURN-
ING SOONEST POSSIBLE STOP MUIR KING FANJOY
CURRIER WILKINSON HILLS RIDDELL DREXEL AL-
READY REPATRIATED STOP FRESHOUR IN HOSPITAL
NOT SERIOUS STOP BALZER FAILED JOIN STOP
HAVE APPOINTED DALGETY COMPANY AGENTS=

=AXEL MICHELSON

(05)

25 AB FANJOY CURRIER FRESHOUR AXEL

1813

Libelant's Trial Exhibit 16.

Libelant's Deposition Exhibit 13.

[POSTAL TELEGRAPH]

3/27/42

LC
AXEL MICHELSON
CARE DALGETY AND COMPANY
461 BOURKE STREET
MELBOURNE (AUSTRALIA)

YOUR TWENTYTHIRD TWENTYFOURTH RECEIVED STOP ASKING UNDERWRITERS FOR INSTRUCTIONS OF WHICH WILL ADVISE YOU STOP WE HAVE NO ADVICES ITINERARY SHIP WHICH REQUIRED FOR INSURANCE PURPOSES STOP IF PERMITTED ADVISE ITINERARY SHIP SINCE LEAVING STATES 1814

H W WARLEY PRESIDENT
CALMAR STEAMSHIP CORPORATION
(25 BROADWAY NEW YORK CITY NY)

Libelant's Trial Exhibit 17.

Libelant's Deposition Exhibit 14. 1815

[POSTAL TELEGRAPH]

LJ155N 56 IMP XCI FIL=MELBOURNE 30 1510—

1942 MAR 30 PM 5 52

CALMAR

BETHLEHEM STEEL CORPN 25 BROADWAY NYC= CONSULTED BY MICHELSON SHIP FOUNDERED STOP ACCESSIBLE HALF LENGTH AT LOW TIDE BUT MICHELSON CONSIDERS CONSTRUCTIVE TOTAL LOSS STOP RECOMMEND TENDER ABANDONMENT STOP MICHELSON JUST ARRIVED AND PROTEST NOTED STOP DELAYED ARRIVAL AND PROTEST COMPLETELY JUSTIFIED STOP APPLY NAVY FURTHER PARTICULARS STOP ACKNOWLEDGE=

MALLESON STEWART AND CO SOLICITORS MELBOURNE.

1816

Libelant's Trial Exhibit 18.

Libelant's Deposition Exhibit 12.

UNITED STATES MARITIME COMMISSION
Washington

April 3, 1942

CONFIDENTIAL

Mr. H. W. Warley, President
Calmar Steamship Corporation
25 Broadway
1817 New York, New York

SS. *Portmar*

Dear Mr. Warley:

On February 23rd we received advices through the Navy to the effect your SS. *Portmar* was damaged in an air raid February 19th, 1942 at Port Darwin. We were advised the extent of damage to the ship and further details with respect to the crew unknown.

On April 1st we received through Navy channels a despatch from the Naval Observer, Melbourne, reading as follows:

1818

"Darwin advises *Portmar* aground amidships to stern perforated port side by shrapnel. Does not believe can be salvaged as cargo carrier but might be as hulk or floating store".

Very truly yours,

J. C. OUTLER
Chief, Ship Control Section
War Shipping Administration

1819

Libelant's Trial Exhibit 19.

Libelant's Deposition Exhibit 17.

[WESTERN UNION CABLEGRAM]

APRIL 7, 1942

MALLESON STEWART & CO.
MELBOURNE, AUSTRALIA

GIVING UNDERWRITERS NOTICE ABANDONMENT PORTMAR INFORM MASTER

H W WARLEY PRESIDENT
CALMAR STEAMSHIP CORPORATION 1820
25 BROADWAY
NEWYORK, N Y

Libelant's Trial Exhibit 20.

(Consisting of 20 cables and 1 letter)

Libelant's Deposition Exhibit 16.

[POSTAL TELEGRAPH]

LP271N 33 CABLE VIA IMPERIAL XCI FIL=MELBOURNE 1821
6 1942 APR 6 PM 2 27

CALMAR=

=CARE BETHLEHEM STEEL 2 BWAY NYC (BG)=
YOURS TWENTYSEVENTH RECEIVED STOP SENT CHIEF MATE HOME WITH CREW AND ACCOUNTS STOP WILL FOLLOW AS SOON AS YOUR INSTRUCTIONS RECEIVED AND CARRIED OUT=

AXEL MICHELSON.

1822 *Libelant's Trial Exhibit 20.*

Libelant's Deposition Exhibit 18.

[WESTERN UNION CABLEGRAM]

NEW YORK, APRIL 10, 1942

AXEL MICHELSON
CARE MALLESON, STEWART & CO., SOLICITORS
MELBOURNE
AUSTRALIA

YOURS FIRST AND SIXTH RECEIVED PLEASE ARRANGE RETURN HOME SOON AS POSSIBLE

1823 H W WARLEY PRESIDENT
CALMAR STEAMSHIP CORPORATION
(25 BROADWAY NEW YORK NY)

MPB

Libelant's Deposition Exhibit 19.

[POSTAL TELEGRAPH]

LB310N 63 IMP CABLE=N MELBOURNE 13 1735
CALMAR STEAMSHIP CORPN=
25 BWAY NYC (BG)=

1824 YOURS TENTH RECEIVED SINCE INFORMED SHIP REFLOATED AUSTRALIAN AUTHORITIES SALVAGE CARGO STOP SALVAGE OFFICER CONSIDERS SUBJECT FURTHER EXAMINATION AND TEMPORARY REPAIRS COULD PROCEED UNDER STEAM DOCKYARD PORT STOP UNTIL DOCKED CANNOT ASSESS PERMANENT CONDITION HULL STOP VIEW ABSENCE NORMAL VIBRATIONS HULL AFTER NUMEROUS NEAR MISSES PERSONALLY BELIEVE STRUCTURE WEAKENED THROUGHOUT STOP DO INSTRUCTIONS RETURN STAND

AXEL MICHELSON

Libelant's Trial Exhibit 20. 1825

Libelant's Deposition Exhibit 20.

[WESTERN UNION CABLEGRAM]

APRIL 16, 1942

CAPTAIN MICHELSON.
CARE MALLESON, STEWART & CO
MELBOURNE
AUSTRALIA

YOURS THIRTEENTH CANCEL PREVIOUS INSTRUCTIONS AND REMAIN AUSTRALIA UNTIL FURTHER ADVISED STOP PLEASE CABLE PROMPTLY FULL REPORT STATUS 1826
VESSEL

H W WARLEY PRESIDENT
CALMAR STEAMSHIP CORPORATION
(25 BROADWAY NEW YORK NY)

Libelant's Deposition Exhibit 21.

James G. Freshour

Melbourne, Victoria, April 17, 1942
Nearly Midnight 1827

Mr. H. W. Warley, President,
Calmar Steamship Corporation.
25 Broadway, New York, N. Y.

Dear Sir:

This will be handed to you or to Mr. Usher by Mr. James G. Freshour, who will for identification purposes sign his name above the date of this. He is the last man, but myself, of the *Portmar's* crew to return to U. S.

Melbourne is more than 2000 miles away from the place where *Portmar* was beached, before she sunk. It is for military reasons, impossible or almost so, to get here from Melbourne to Darwin or return.

1828 *Libelant's Trial Exhibit 20.*

I am trying to keep my eyes open and see what they are doing to Americans here, and it is plenty.

I heard that the *Portmar* had been refloated from a fellow, who works for a Classification Society, but I could get no confirmation of such news. As this would change the whole situation I was very anxious to get exact information and I succeeded with my, or rather our lawyer to see Sir Owen Dixon, a High Court Justice, who is at present supreme in Australian Shipping Control. Sir Owen had summoned a Captain Williams, head of a salvage concern
1829 who had refloated the *Portmar* and made him tell his story. The ship was refloated only for the reason that half the field guns and equipment of an American Regiment of Field Artillery was in our 4 and 5 holds and the Chief Mate and Chief Engineer will, when they arrive, tell you that to refloat the ship was no great feat in itself. Having got her afloat the salvage company, who through the Australian Navy did the work for the American Army, decided that it would be possible to repair her and put her back into service and they are undoubtedly this minute in touch with the Insurance Company telling them how easy it would be to do this. In my honest opinion it cannot be done because she is so weakened in her structure and has so much dam-
1830 age to hull; boilers and engine that it will cost considerable more to rebuild her than the result would be worth.

The nearest dry dock is 3000 miles away in Sydney. There are no facilities at all in Darwin so that she could be temporarily repaired so that she could even make this trip under her own steam. With the Japanese patrolling at least the first 1500 miles of this distance daily there is no chance at all that she would ever reach Sydney. I might also mention that ships waiting for dry dock repairs in Sydney when we were there four months ago are still waiting.

Sir Owen Dixon and Captain Williams are now, and this is a fact of which I have personal knowledge, in touch with Mr. William Wasserman the New American Lease Lend

Libelant's Trial Exhibit 20.

Director for Australia. He has just arrived. They are trying to get him to authorize money enough to pay all the enormous expenses that it would take to make her a serviceable ship again. They all act as if she was a prize of war instead of her being the property either of the Calmar Line or the Insurance Company but as long as they can work on American money they seem to have few scruples. I have just a few minutes ago had a phone call from the lawyers and they read your latest telegram to me that orders me to stay here in Australia until further orders. If the tender of abandonment has been withdrawn by you or if it has not been accepted by the insurers, I shall do everything in my power to safeguard your property and your interests but I would appreciate it if you will as much as possible keep me informed of your wishes and desires in the matter.

The Chief Mate and Chief Engineer will tell you all about the state of the ship. There is nothing left in her of anything. The hull is so shaken up that at least half the rivets in my opinion will have to be redriven. She leaks through stern tube and bottom and movements of shell plating on frames has taken place along her port side at least half her length.

At dusk when I returned to my hotel I met Mr. Brown from Sydney, the General Agent in Australia of the Matson Line, on the street. He told me that Col. Frank La Rue, commanding all American troops in the Darwin area had told him that the *Portmar* would be repaired at any cost because U. S. Army wanted her here on the Coast. But then I do not trust Mr. Brown too much. The Matson Line are Agents for U. S. Army in Australia and are running their ships out here as Army transports but they return as Matson ships, when they go back. Also, I noticed that they get all the wool, while the other U. S. ships get the lead and the chrome ore. With James Freshour, the bearer of this, I send you also the protests.

Those made out by the lawyers are the original ones. The others made out by the consul are copies of them,

Libelant's Trial Exhibit 20.

1837

UNFOUNDED OWNERSHIP REMAINS IN COMPANY OR UNDERWRITERS STOP FURTHER INFORMATION CONDITION VESSEL AWAITS SALVAGE COMPANY DIVERS REPORT STOP ADVISE WHETHER ABANDONMENT ACCEPTED BY UNDERWRITERS IF NOT SOLICITORS SUGGEST YOU OBTAIN CONCURRENCE UNDERWRITERS OUR TAKING ALL NECESSARY ACTION REBUT ARMY CLAIM WITHOUT PREJUDICE NOTICE ABANDONMENT STOP COURSE PROPOSED IS FORMAL REPOSSESSION OF VESSEL OR IF OTHER PARTIES IN POSSESSION INJUNCTION RESTRAINT THEM INTERFERING WITH PROPERTY

AXEL MICHELSON 1838
1222P

Libelant's Deposition Exhibit 23.

[WESTERN UNION TELEGRAM]

APRIL 21, 1942

AXEL MICHELSON
MALLESON, STEWART & CO
MELBOURNE
AUSTRALIA

1839

YOURS TWENTIETH ABANDONMENT NOT ACCEPTED STOP TITLE VESTED UNDERWRITERS IF ABANDONMENT GOOD OTHERWISE REMAINS IN OWNERS STOP ADVISE NAME ARMY OFFICER ASSERTING OWNERSHIP STOP ADVISE POSSIBILITY YOUR RETURNING VESSELS LOCATION STOP WE AWAIT YOUR REPORT PRESENT CONDITION VESSEL

H W WARLEY PRESIDENT
CALMAR STEAMSHIP CORPORATION
(25 BROADWAY NEW YORK NY)

1840

Libelant's Trial Exhibit 20.

Libelant's Deposition Exhibit 24.

[POSTAL TELEGRAPH]

RAA145 224 IMP FIL
MELBOURNE 25 1200

APR 25 AM 6 28 INS—PORTMAR—WI

CALMAR STEAMSHIP CORPORATION
25 BROADWAY NEW YORK

1841 YOURS TWENTY FIRST AM ASSURED PREVIOUS UNDERSTANDING ARMY ASSERTING OWNERSHIP MISAPPREHENSION STOP DIVERS REPORT FOLLOWS QUOTE TEMPORARY REPAIRS COMPLETED OIL LEAKAGE GENERAL IN TANK TOP STOP CANNOT RAISE STEAM OWING TO DANGER OF FIRE STOP TUG URGENTLY REQUIRED POSITION SALVAGE EXCELLENT STOP RUDDER AND

(PAGE 2)

HAND STEERING GEAR IN GOOD ORDER END QUOTE GOVERNMENT SALVAGE BOARD OFFICER NOW AGREES MY VIEW THAT OWING ABSENCE FACILITIES PUT VESSEL IN SAFE CONDITION CANNOT BE MOVED EX-
1842 CEPT BY TOWING STOP LEAKAGE OIL INDICATES PERFORATED BOTTOM STOP INFORMED TAKES SIX INCH PUMP CHECK FLOW STOP NEAREST DRY DOCK WHERE

(PAGE 3)

SHIP WAS NEW YEAR STOP TOW DIFFICULT AND RISKY STOP SALVAGE BOARD HAS WAR TIME POWERS MAKE SALVAGE ARRANGEMENTS TO EXCLUSION ANY STEPS CONTEMPLATED BY OWNERS OR UNDERWRITERS STOP BOARD HAS REQUESTED LEASE LEND AUTHORITIES FINANCE SALVAGE STOP UNDERSTAND ONLY CONCERN LEASE LEND AND AMERICAN ARMY RECONDITION SHIP FOR USE

Libelant's Trial Exhibit 20. 1843

(PAGE 4)

HOWEVER DESIRABLE STOP BOARD ADVISES TWO TUGS NECESSARY BUT DOUBTFUL ANY AVAILABLE STOP ALSO DOUBTFUL WHETHER DOCK AVAILABLE FOR SEVERAL MONTHS STOP NO DECISION FUTURE ACTION YET MADE STOP SALVAGE BOARD WILL CLAIM SALVAGE REWARD FOR RAISING IF SHIP FINALLY RECOVERED STOP IF FACILITATED BY ARMY COULD RETURN LOCATION TWELVE

(PAGE 5)

DAYS STOP AT PRESENT CAN DO MORE HERE STOP 1844
MATE AND CHIEF ARRIVING SOON STOP IF SHOWN TELEGRAMS COULD SUPPLY FULL INFORMATION

AXEL MICHELSON

Libelant's Deposition Exhibit 25.

[POSTAL TELEGRAPH]

LONG LA686N 61 CABLE VIA IMPRIAL XCI=MELBOURNE 28 8)=

DLT CALMAR STEAMSHIP CORP=25 BROADWAY NEW 1845
YORK (KBG)=

LL APR 29 PM 7 20

THE FOLLOWING MY OWN BUT UNCHANGED WELL CONSIDERED OPINION THAT SHIP CONSTRUCTIVE TOTAL LOSS OPINION SALVORS AND REPORT THEIR DIVERS PREVIOUSLY QUOTED NOT IN KEEPING WITH WHAT I KNOW AND HAVE SEEN BEFORE SHIP FILLED WITH OIL AND SAND STOP SHIP SALVABLE ONLY IF RISKS EXPENSES AND LOSS OF TIME ABSOLUTELY IGNORED=

AXEL MICHELSON.

1846 *Libelant's Trial Exhibit 20.*

Libelant's Deposition Exhibit 26.

[Western Union Telegram]

1942 MAY 22 PM 6.35

FY441 VIA RCA=F MELBOURNE 22 NFD
NLT CALMAR STEAMSHIP CORPN=
25 BROADWAY NEW YORK=

OF NO USE HERE LONGER COULD IF BECOME NECESSARY BE SENT OUT AGAIN—

1847 AXEL MICHELSON.

MICHELSON.

Libelant's Deposition Exhibit 27.

[Postal Telegraph]

L40 36 CABLE FIL VIA IMPL XCI=MELBOURNE 1125 MAY 27 1942

CALMAR STEAMSHIP CORPN=
25 BROADWAY NEW YORK=

1848 HAVE YOU RECEIVED CABLES OF APRIL TWENTYFIFTH AND TWENTYEIGHTH STOP HAVE MATE AND CREW ARRIVED AND FRESHOUR WITH EXTENDED PROTEST STOP RETURNING HOME IF NO FURTHER INSTRUCTION RECEIVED=

AXEL MICHELSON.
25 FRESHOUR FURTH. 945A

Libelant's Trial Exhibit 20. 1849

Libelant's Deposition Exhibit 28.

[WESTERN UNION CABLEGRAM]

MAY 26, 1942

AXEL MICHELSON
c/o MALLESON STEWART & CO
MELBOURNE
AUSTRALIA

REGRET UNABLE APPROVE YOU RETURN HOME FOR PRESENT AS NECESSARY YOU REMAIN UNTIL AFTER PROPOSED INSPECTION AND SURVEY OF VESSEL IN 1850
DRYDOCK. PROBABLY AT PORT WHERE SHE WAS JANUARY FIRST STOP YOU AND ATTORNEYS WILL PLEASE CONTACT CHARLES BROWN AGENT MELBOURNE FOR MARITIME COMMISSION RESPECTING SURVEY STOP BROWN WILL ASSIST IN ARRANGING SURVEY WHICH WE ARE ADVISED WILL HAVE TO BE DONE BY SUPERINTENDENT ARMY TRANSPORT ABOVE PORT STOP IF ATTORNEYS APPROVE SUGGEST AMERICAN TRADING COMPANY BE RETAINED AS OUR SURVEYORS.

H W WARLEY PRESIDENT
CALMAR STEAMSHIP CORPORATION
(25 BROADWAY NEW YORK NY) 1851

Libelant's Deposition Exhibit 29.

[WESTERN UNION TELEGRAM]

1942 MAY 27 AM 10 23

FY58 19 VIA RCA—F MELBOURNE 27 1720
CALMAR SHIPPING CORP—
25 BWAY NYK—

YOURS TWENTYSIXTH RECEIVED AND UNDERSTOOD SHALL REMAIN AND CARRY OUT ORDERS—.

AXEL MICHELSON.

25.

1852 *Libelant's Trial Exhibit 20.*

Libelant's Deposition Exhibit 30.

[WESTERN UNION CABLEGRAM]

JUNE 27, 1942

AXEL MICHELSON
C/O MALLESON, STEWART AND CO.
MELBOURNE
AUSTRALIA

MARITIME COMMISSION INFORMS US VESSEL ALREADY AT OR ENROUTE TO PORT WHERE SHE WAS JANUARY
1853 FIFTH STOP SUGGEST YOU CONFIRM WITH BROWN AND GO THERE PROMPTLY FOR SURVEY STOP PLEASE ACKNOWLEDGE

H W WARLEY PRESIDENT
CALMAR STEAMSHIP CORPORATION
(25 BROADWAY NEW YORK NY)

Libelant's Deposition Exhibit 31.

[RCA RADIOGRAM]

1854

JUN 29 AM 9 23

CFA/MQ ML 117
MELBOURNE 21 29 1321

H W WARLEY PRESIDENT CALMAR STEAMSHIP CORPORATION 25
BROADWAY NEW YORK

YOURS TWENTYSEVENTH. WILL MEET VESSEL ON ARRIVAL DESIGNATED PORT

AXEL MICHELSON

Libelant's Trial Exhibit 20. 1855

Libelant's Deposition Exhibit 32.

[WESTERN UNION TELEGRAM]

1942 JUL 1 AM 10 56

FV286 VIA RCA-F MELBOURNE 26 1/1715
H W WARLEY PRESIDENT CALMAR STEAMSHIP CORPORATION—
25 BROADWAY NYK—

EARLIEST ARRIVAL VESSEL TWELVE DAYS STOP SEND THREE EACH, DECK ENGINE AND OFFICIAL 1856
LOGS—

AXEL MICHELSON.

Libelant's Deposition Exhibit 35.

[WESTERN UNION CABLEGRAM]

NEW YORK, N. Y., JULY 20, 1942

CAPTAIN AXEL MICHELSON
c/o MALLESON, STEWART AND COMPANY 1857
MELBOURNE
AUSTRALIA

ASSUME VESSEL AT OR NEAR REPAIR STATION STOP YOU UNDERSTAND THOROUGH SURVEY MUST BE MADE AND ESTIMATE MADE COST REPAIRS INCLUDING COST RAISING AND TOWING ALSO ESTIMATE OF VALUE OF VESSEL WHEN REPAIRED STOP LOGBOOKS SENT YOU MAIL FOURTH

H W WARLEY PRESIDENT
CALMAR STEAMSHIP CORPORATION
(25 BROADWAY NEW YORK NY)

1858 *Libelant's Trial Exhibit 20.*

Libelant's Deposition Exhibit 36.

[Postal Telegraph]

K11 21 CABLE VIA IMP=MELBOURNE FIL 0940 JUL 23 1942

H W WARLEY=

PRESIDENT CALMAR STEAMSHIP CORPN 25 BROADWAY NY=

VESSEL MAY ARRIVE WEEKS TIME FULLY UNDERSTAND YOUR INSTRUCTIONS=

1859 AXEL MICHELSON.

Libelant's Deposition Exhibit 47.

[RCA Radiogram]

JAN 27 1943

HRCFA ML82

MELBOURNE 27 26 1130 XCI

NLT H W WARLEY PRESIDENT CALMAR STEAMSHIP

1860 CORPORATION

BROADWAY NEW YORK=

NO USE REMAIN LONGER LAWYERS HAVE CASE WELL IN HAND WANT CALMAR SHIP SEND ORDERS

AXEL MICHELSON

Libelant's Trial Exhibit 20. 1861

Libelant's Deposition Exhibit 48.

[RCA RADIOGRAM]

MAR 3 1943

CFATO ML52
MELBOURNE 33 2 17 XCI

NLT H W WARLEY PRESIDENT CALMAR STEAMSHIP CORP 25 BWAY NYC

ALL MY TESTIMONY IN THE CASE HAS BEEN TAKEN AND ALL SURVEY REPORTS AND ADJUSTMENTS NOW TURNED IN TO SOLICITORS 1862

AXEL MICHELSON

Libelant's Deposition Exhibit 49.

[WESTERN UNION CABLEGRAM]

NEW YORK MARCH 3, 1943

CAPT. AXEL MICHELSON
C/O MALLESON STEWART & COMPANY
46 QUEEN STREET
MELBOURNE, AUSTRALIA 1863

SUBJECT TO APPROVAL MALLESON STEWART YOU MAY RETURN HOME

H W WARLEY PRESIDENT
CALMAR STEAMSHIP CORPORATION

1864

Libelant's Exhibit 21.

WAR SHIPPING ADMINISTRATION
WASHINGTON

Refer to: FJZ

October 24, 1942

Calmar Steamship Corporation
25 Broadway
New York, New York

'NS—*Portmar*—W1

1865 Attention: W. H. Warley
President

Gentlemen:

Re: Time Charter—SS *Portmar*—Contract MCc-1915

Your letter dated October 19, 1942, addressed to the United States Maritime Commission has been referred to me. I have the following to say with respect to your summary of the immediate important steps suggested, numbered one to five inclusive on Page 5 of your letter.

(1) We are agreeable to your recommendation that the Salvage Board complete the tow of the *Portmar* to the Port of Sydney at which port she may be surveyed or re-
1866 paired. In the alternative the vessel may proceed under her own power. The repairs, of course, will depend upon the action taken with respect to the disposition of the vessel. We should prefer to submit the Board's claim for compensation for the raising and towing of the vessel and the Army's claim for work done on the vessel to arbitration. If arbitration is not feasible, we recommend submission of these claims to the Australian Courts.

(2) We are agreeable to the recommendation made in the paragraph marked 2, namely, the Commission will join with you in making an effort to obtain full survey of the damage to the vessel upon being drydocked and of cost of repairing such damage so as to restore her to the condition at which she was at the time of her bombing. This survey,

Libelant's Exhibit 21.

of course, shall be without prejudice as to whether the condition of the vessel at the time of bombing met the requirements of full classification.

(3) We shall assist in obtaining, without prejudice, a valuation of the vessel as she will lie damaged in Sydney after the survey.

(4) It is our position that the Commission's obligations under the charter to pay hire ceased at the time of the sinking at Port Darwin. We have previously written suggesting that the War Shipping Administration purchase this vessel in her sunken condition following enemy action at Port Darwin on February 19, 1942, the value of the vessel to be the subject of mutual consent. A possible determination of the purchase price would be as for just compensation in accordance with the provisions of Section 902 of the Merchant Marine Act. In the alternative the purchase price might be arrived at by deducting from the insured value of $860,000 the cost of raising the vessel, towage, salvage or other work performed by the Army, the estimated cost of repairs necessary to restore the vessel to her condition at the time of the bombing, and such other expenses directly related to the further operation of the vessel.

The above will be conditioned upon the approval of your underwriters and the suggestions are and the final agreement would be without prejudice to any of the rights of interested parties.

We shall be obliged for a prompt reply.

Very truly yours,

W RADNER

William Radner
General Counsel

1870

Libelant's Trial Exhibit 22.

Deposition Exhibit 46.

[WESTERN UNION TELEGRAM]

WU232 TWS PAID 3 GOVT=WUX WASHINGTON DC 12 345P

1942 NOV 12 PM 3.50

CALMAR STEAMSHIP CORP=
25 BROADWAY NYK=

1871

WAR SHIPPING ADMINISTRATOR HAS REQUISITIONED TITLE TO AND POSSESSION OF YOUR VESSEL SS PORTMAR OFFICIAL NUMBER 219283 NOW AT BRISBANE EFFECTIVE UPON TAKING POSSESSION THEREOF FOR PURPOSES SUCH REQUISITION, PURSUANT TO SECTION 902 OF MERCHANT MARINE ACT 1936 AS AMENDED OUR REPRESENTATIVE AT SYDNEY HAS BEEN INSTRUCTED TO TAKE DELIVERY OF VESSEL AS SOON AS POSSIBLE AND TO GIVE YOUR REPRESENTATIVE APPROPRIATE RECEIPT THEREFOR COMPENSATION FOR VESSEL WILL BE DETERMINED AND MADE IN ACCORDANCE WITH ABOVE MENTIONED PROVISION OF LAW=

1872

W C PEET JR SECRETARY.

Libelant's Exhibit 23.

1873

UNITED STATES OF AMERICA
WAR SHIPPING ADMINISTRATION

BRISBANE, QUEENSLAND
November 17, 1942.

THIS IS TO CERTIFY that the United States War Shipping Administrator has requisitioned title to and possession of the vessel *"Portmar"* pursuant to the provisions of Section 902 of the Merchant Marine Act of 1936 as 1874
amended, effective as of the date and hour of taking delivery thereof; that the undersigned, H. A. Rettig, acting for and on behalf of the War Shipping Administrator has taken delivery at 12 o'clock noon on November 17, 1942, Eastern Australian Time, at Brisbane, Queensland, Australia, and that such requisition has therefore become effective at the said date and hour.

(SGD) H. A. RETTIG
Superintending Engineer

United States War Shipping Administration 1875

Libelant's Exhibit 24.

Computation of charter hire of SS *Portmar* from February 19, 1942 to November 17, 1942. To be separately submitted to the Court.

Libelant's Exhibit 25.

List of expenses paid by Calmar Steamship Corporation. To be separately submitted to the Court.

1876

Libelant's Exhibit 25A.

EXPENSE ITEMS FROM LIBELANT'S EXHIBIT 25 WHICH LIBELANT CLAIMS ARE CHARGEABLE TO UNDERWRITERS IN THIS CASE:

SALVAGE JUDGMENT AND COSTS:

ITEM 1:

Amount paid by Malleson, Stewart to satisfy Salvage Judgment and Costs	$20,008.59

1877

SUE AND LABOR EXPENSES:

ITEM 1:

Amount retained by Malleson, Stewart for their fee and disbursements	$ 7,313.76

ITEM 2:

Howell & Gibson—Survey fee	397.50

ITEM 3:

Captain Michelson's Expenses:

1878

Expenses until leaving Darwin	92.40
Expenses to Brisbane via Sydney	40.24
Expenses surveying ship Brisbane	16.72
Expenses Sydney	1.84
Fare Melbourne	17.85
Fare Melbourne (second trip)	17.85
Telegram to Lawyers in Melbourne	3.53

Libelant's Exhibit 26. 1879

Paid to Dalgety for car hire, survey fee of Taylor & Horne, etc.	89.50	
Cables sent by Michelson	66.94	
ITEM 4:		
Wages—Capt. Michelson From Feb. 20, 1942 to return to New York, exclusive of repatriation period	5,817.60	1880
ITEM 5:		
Meals and lodging allowance to Capt. Michelson	2,926.00	
ITEM 8:		
Cablegrams to Melbourne	1,138.61	
	$17,940.34	$17,940.34
	Total	$37,948.93

Libelant's Exhibit 26. 1881

Deposition of Captain Axel Michelson (pp. 272 to 449).

Libelant's Exhibit 27.

Profile plan of SS *Portmar.* To be separately submitted to the Court.

Libelant's Exhibit 29.

Chart of harbor of Port Darwin with marks made by Captain Michelson. To be separately submitted to the Court.

1882

Libelant's Exhibit 30.

Receipt dated February 21, 1942, given to Captain Michelson for secret codes, by Australian Naval Authorities. To be separately submitted to the Court.

Libelant's Trial Exhibit 31.

Deposition Exhibit 6.

1883

HEADQUARTERS
BASE SECTION NUMBER ONE
Darwin, Northern Territory, Australia

26 February 1942

MEMORANDUM

To: Captain Michelson and members of the crew of the SS. *Portmar.*

1. Confirming my verbal statement of February 24 concerning transportation to Melbourne for all survivors of ships sunk at Darwin. As soon as transportation is available and the line of communications can carry personnel you will be dispatched to Melbourne.

1884

2. Further I wish to make a matter of record my appreciation to your crew for their assistance in offloading the SS. *Admiral Halstead.* Please be assured that the working of gasoline from the *Halstead* will in no way delay your departure.

Frank Larue

FRANK LARUE
Lt. Col., Inf.
Commanding

Libelant's Exhibit 33. 1885

Marine extended protest of Axel Michelson, Master, Joseph Bullock, Mate, John B. Cumber, Chief Engineer, Charles H. Mathews, Deck Engineer, and Eivind Steen, A. B., before United States Vice Consul at Melbourne, dated March 25, 1942. To be separately submitted to the Court.

Libelant's Exhibit 35.

Captain Michelson's extended protest before Edward James Hamilton, Notary Public, dated March 27, 1942 at Melbourne, Australia. To be separately submitted to the Court. 1886

Libelant's Trial Exhibit 39.

Deposition Exhibit 37.

Brisbane,
Queensland.

August, 1st, 1942. 1887

Captain Douglas Taylor.
Marine Surveyor.,
Circular Quay,
Brisbane.

Dear Sir,

Having received orders from my owners, the Calmar Steamship Corporation of 25 Broadway, New York, to employ surveyors for an owners survey of the SS. *"Portmar"* which has recently arrived at this port after having been raised and towed down from Port Darwin, where she was sunk by enemy action on Feb. 19th, you have by Dalgety's, my agents in Brisbane, been recommended to

1888 *Libelant's Trial Exhibit 39.*

me for such survey. It was pointed out to me by them that you were Surveyor to the American Bureau of Shipping, British Corporation Register, Norwegian Veritas etc.

You are therefore respectfully requested to carry out such a survey for us, or as much of it as would be possible for you without seeing the ship in a dry dock. It being my understanding that no dock in Brisbane is of sufficient capacity to accommodate the vessel. If it would later on be possible for you to complete the survey after the ship has been moved to a port where she can be dry docked, it would be much appreciated.

1889 Besides furnishing me with a report of the present condition of the ship, that is, Hull and Machinery, you are requested also to give me your estimate of the time and cost required for such repair, reconditioning and re-equipment of the ship, as would regain her her former class in Lloyd's.

Your report would be expected to contain, besides a general description of Hull, Machinery and boilers in their present condition also some details of the condition of decks, steel and wooden, bridge, rigging, cargo gear, winches and deck machinery, deck houses, wheel house and radio house, quarters in deck houses and poop for officers

1890 and crew; also of holds, hatches, and cargo battens and ceiling on tank tops, steering gear and steering engine, engineers machine shop, dynamos, condenser, pumps and auxiliaries, propellor and shafting, refrigerating machinery, radio equipment and a short statement on the condition or non-existence of equipment in the navigating department and also deck, engineer and stewards departments.

It is hoped that you will be able to give me an early and favourable answer to my above request.

Very respectfully yours,

AXEL MICHELSON,
Master, SS. *Portmar*,
C/—Dalgety & Co. Ltd. Brisbane.

Libelant's Trial Exhibit 40, 1891
Deposition Exhibit 38.

R. DOUGLAS TAYLOR

Marine Surveyor

Claims Adjuster
Ship Valuator
Measurer and
Compass Adjuster
Cable Address: "Rolyat"
Codes Used A B C 5th Edition

Telephone B 6435
Surveyor to
the
British Corporation Registry
American Bureau of Shipping
Bureau Veritas
Det Norske Veritas
Registro Navale Italiano
and
Imperial Japanese Corporation

Circular Quay,
Petrie's Bight. 1892

Brisbane 4th August, 1942.

Captain A. Michelson,
s.s. *"Portmar"*
C/—Messrs. Dalgerty & Co. Ltd.,
Brisbane.

Dear Sir.

I have to acknowledge receipt of your letter of August 1st. in which you have explained fully my duties in respect to making survey of the s.s. *"Portmar"* which will probably be in Brisbane for some considerable time. 1893

This survey, I understand, will be on behalf of your Owners and self. I have carefully read your letter and understand fully what you require and therefore will carry out your instructions to the best of my ability.

I intend to ask Lieut. Commr. A. G. Horn, R. A. N. R., Engineer Surveyor, to assist me in this work so far as engines and machinery are concerned. He has had wide experience in this work and is recommended as a very clever engineer, and he holds 1st. class Board of Trade Steam & Diesel Engine Certificates, 1st class Engine Aust. Certificate and 1st class Refrigerating Certificates, and his assistance will be most valuable.

This survey will undoubtedly take some time to complete but I will furnish you with reports as soon as possible.

Yours respetfully,

R. DOUGLAS TAYLOR,
Marine Surveyor.

1894

Libelant's Trial Exhibit 41.

Deposition Exhibit 39.

Headquarters
United States Army Services of Supply
Southwest Pacific Area
Transportation Service

A. P. O. 501
TGP.ah

1895

July 27th, 1942.

Subject: s.s. *"Portmar"*

To: The Superintendent, Army Transport Service, Base Section 3, A. P. O. 923.

1. This will authorize you to permit bearer, Captain Axel Michelson, former Master s.s. *"Portmar"*, to visit this vessel while she is in the port of Brisbane, for the purpose of inspecting her condition.

For the Chief of Transportation Service:

1896

T. G. PLANT,

T. G. Plant,
Colonel, A. U. S.,
Chief of Water Section.

Signature of Capt. Michelson:

Axel Michelson.

Approved:

J. M. Grimm,
Supt. A. T. S.,
Brisbane, July 30th, 1942.

Libelant's Trial Exhibit 42. 1897

Deposition Exhibit 40.

COMMONWEALTH SALVAGE BOARD

BRISBANE, 13th August, 1942.

Captain Michelson.
C/o Messrs. Dalgety & Co. Ltd.,
Brisbane.

Dear Sir.

1898

This is to advise you that the Salvage Board is prepared to allow you to board the s.s. *"Portmar"* in company with your Surveyors for the purpose of ascertaining the present condition of the vessel. It is understood that you will furnish the Salvage Board with a copy of the Surveyors' Report in due course provided you are permitted to do so by your Legal Advisers.

Yours faithfully,

J. P. WILLIAMS
Chief Salvage Officer.

1899

This letter is to be retained by Capt. Michelson so that he may board the ship whenever he desires. This applies also to his Surveyors.

J. P. WILLIAMS

1900

Libelant's Trial Exhibit 43.

Deposition Exhibit 41.

COMMONWEALTH OF AUSTRALIA

Crown Solicitor's Office,
450 Law Courts Place,
Melbourne C. 1.

19th August 1942.

Messrs. Malleson Stewart & Co.
Solicitors,
1901 46 Queen Street,
Melbourne C. 1.

Dear Sirs,

S.S. *"Portmar"*: Salvage Service

I understand that you act for the owners of s.s. *"Portmar"* which was sunk by enemy action at Darwin.

2. The Salvage Board established by the National Security (Salvage Board) Regulations and the Chief Salvage Officer, with suitable assistance, carried out salvage
1902 of the s.s. *"Portmar"* including towage to a safe port and the Board has instructed me to require payment from the owner of the *"Portmar"* of the sum of £100,000 in respect thereof.

3. Failing payment or satisfactory arrangements for the payment of salvage remuneration, my instructions are to issue a write for recovery of the amount claimed.

Yours faithfully,

H. F. E. WHITLAM
Crown Solicitor

Libelant's Trial Exhibit 44. 1903

Deposition Exhibit 42.

BRISBANE AUG. 14 '42

Malleson Stewart & Co.
Queen Street, Melbourne

Gentlemen:

On receiving your wire yesterday I saw Col. Grimm at once. He told me that he would put me on board the ship with my surveyors at any time in spite of anybody. Later in the day I was with Mr. Smales of Dalgety's invited to meet Capt. Williams and Mr. Rogan at McDonald Hamiltons. Present also was Mr. Plant of Gibbs Bright & Co. who is Lloyds Agent. I showed them your telegram endorsed by Col. Grimm and was then given blanket permission by them also. Capt. Williams asked me for a copy of my surveyors report which I told him he could have only with my lawyers approval and on condition that he at the same time furnished us with a similar report of the ship at the same time. 1904.

We started the survey today. Mr. North, who is Lloyds surveyor was there at the same time as was also Mr. Reddick who is Mr. Flanagans corresponding number up here. But he is no Flanagan. 1905

In charge of the ship which is moored about 9 miles out of Brisbane at Pinkenbar, we found a Mr. Kemp, whom all the surveyors knew and admitted to be a good man. He has only been put in charge lately, but he is running several other jobs, some for the R. A. Navy at the same time. His present orders are to put the ship in such condition that she can under her own steam proceed to a dock in Sydney. I have not seen the surveyors yet and have only a vague idea of their findings. It will take them several more visits to see it all or even most of it and lot of it they will not be able to see for perhaps months yet.

1906 *Libelant's Trial Exhibit 45.*

Here are my own impressions:

A lot of cleaning work has been done on her and on the surface of things she does not look bad. But this is all. Of real work that will help to put her back in commission but very little has been done. They are cleaning up in engine room and fire room yet. If more work is not done on her then they seemingly intend to do they will not run far. She is still in my opinion a constructive total loss and I much doubt whether any underwriters would take the gamble of putting her back in 100 a-1 class, where she stood in Lloyd's.
1907 But honesty compels me to admit that she could at a good price ~~say 100,000~~ pounds Austr. be made into a serviceable ship which could be used for coasting or war purposes. To have the underwriters accept abandonment and partly reimbursing themselves by selling the ship to the Army would be the most sensible solution and by far the cheapest to all concerned.

To get my letter in the mail I shall have to wind up. More soon.

Yours

AXEL MICHELSON

1908

Libelant's Trial Exhibit 45.

Deposition Exhibit 43.

Brisbane Aug. 15, 1942.

Malleson Stewart & Co.
Queen Street, Melbourne.

Dear Sirs,

I sent you an air mail letter last night telling you about my first visit with my surveyors to the "*Portmar*" I have not seen the surveyors since. Indeed I do not know, when

I shall see them again. They are very busy working for all the services Australian and American. 1909

However, I feel, that what I told you, as being my opinion, of the future possibilities of the ship is very close to being right. Of her present condition there is no doubt. I am telling you just what I saw. I told you last night about the engine and fire room, and that hardly any real work tending to bring the ship back in commission had so far been done. There is indeed a lot more of dead work to be done before any real work can be started. The shaft alley is inaccessible. It is filled with so much fuel oil, mud, dirt and water, that you cannot get into it. How bad it is can best be imagined by telling you, that they were unable to disconnect any of the shaft couplings before they left Darwin and consequently had to drag a dead propeller 2000 miles. But no real determined effort could have been made. I believe I could have done it myself. The boat deck and forward bridge deck, with numerous shrapnel holes in them, have been further ruined by not having had any water on them for months in a tropical climate. At least the boat deck should, in my opinion be renewed. The radio station has been cleaned out. Besides a standard radio set, we had a last model short wave set put in just before we left San Francisco. We paid 6500 dollars for it. The ship has in short been cleaned out of everything, that could be moved, and as one of the party remarked, even of things that could not. All fire apparatus and life saving equipment is gone. So are all navigational equipment, tools, instruments, charts, books, clocks and accessories. Also all furnishings in all quarters which were not ruined by shell fire or water. Likewise all the Steward's stores of bedding, blankets, linen tableware, cooking utensils, galley, baker's and butcher's equipment. I shall here mention that the ice machine was put out of commission by shell fire. This puts the ship's refrigerating plant out of existence until expensive repairs or renewals have been made. A fire engineer's machine shop with first class machines 1910 1911

1912 *Libelant's Trial Exhibit 45.*

acetylene welding sets and tools is gutted of almost everything. Bosns stores, tools and equipment are gone. This includes all the best mooring lines, tarpaulins and spares, all new rope and wire, oils and paint. From the carpenter's shop all tools and moveables are missing. Hospital is cleaned of everything, medicine chest, medical and surgical stores, surgical kits, all equipment and accessories. Her steering engine—she has telemotor and steam steering gear—has been more or less wrecked. It seems by somebody too ignorant to disconnect it when they put her in
1913 hand gear for the tow down. The main items, structural damage to her hull and damage to engine, boilers and auxiliaries, I shall touch but lightly. Of the first you cannot on account of oil and dirt see anything to speak of yet and probably shall not be able to, until she is in dock and properly cleaned. Of the second I do not feel competent to speak.

They tell me that she makes very little water and that she is pumped only every second day. This would indicate that her bottom was not very much damaged. Could it perhaps be, that the bomb which was dropped immediately abaft her propeller could have opened up her stern bearing
1914 and caused her to leak there? This would explain the mess in her shaft alley. I noticed, I had indeed seen it before, that the same bomb blew away her rail aft, tore a quarter chock (mooring lead) off her and damaged her awning stanchions and frames.

I did not go down in her aft holds. Too much oil and dirt there to get round—let alone see anything. No. 2 and 3 did not look bad. There was coal there and a lot of dirt. Also in the lower hold rusty military barbed wire that prevented seeing her frames and sides, where they would most interest you—just forward of her deep tank.

No. 1 is loaded with salted hides which the salvage board had loaded in her in Darwin. They make the whole ship smell a lot worse than bad. They must be for Sydney, else I imagine, they would have been taken out long ago.

Libelant's Trial Exhibit 45.

While I think of it, I may as well mention, that more than half of the ship's standing and running cargo gear must be renewed on account of being cut up by machine gun fire.

If they are going to steam her out of here, it is a fair guess, that she will be here for months yet. Mr. Kemp of whom I spoke in my last letter told me that the Salvage Board had no priorities, and this morning I have been told that he and all his men have been temporarily taken off the ship to take care of a more pressing job for the Austr. Navy. The way it looked until today, it made me almost despair of getting to sea again. It looks a little better now. I shall explain further on. The only way I see of winding up this thing is for the owners underwriters and army to get together back in U. S. There seems to be no doubt, that the Army wants what is left of the Ship let the underwriters settle with my owners and then partly reimburse themselves by selling the ship to the Army, who in their turn could promptly settle with Capt. Williams. With the U. S. Army as the owner she would get priority and I dare say, she could in a reasonable time be made a serviceable ship. If she stays under the control of the Salvage Board, the time is not so far off when the Army will have nothing to show for the towage bill, which Capt. Williams states has been guaranteed by him. Time, dirt, rust and corrosion work against all of them although they do not seem to realize it.

I claim no credit for the above plan, but I could perhaps better afford to sponsor it than others. Unless something is done everyone will lose out. I hope that my owners will be the exception. If you approve of this you may suggest it to Mr. Warley. You may even, as far as I am concerned, consult—informally, Col. Plant about it. I have complete confidence in him playing a fair game with us or—with anybody.

And now about the thing of which I hinted above. Col. Grimm tells me that he needs a master for an American Ship. About the circumstances I know nothing. I told him

1918 *Libelant's Trial Exhibit 45.*

that nothing would please me more than to get a ship; but I told him also that I could not and would not leave my owners. He then asked me if I would take her if the Army got a temporary release for me from my owners, which I gladly promised him to do. So this is how things stand now. I doubt much that my owners would turn the Army down, and my prospects now are therefore better than for a long time.

If the thing goes in order I shall make a flying trip to Melbourne and temporarily turn the case of the "*Portmar*" over to you.

1919

Saturday afternoon Aug. 15th '42.

I have since writing the above received your letter of Aug. 13th but the one I sent you last night will have informed you that I now have the necessary permission. I have been trying to contact my surveyors to find out when I shall be able to get a preliminary report; but they are so busy that I have been unable to find out.

Monday Noon Aug. 17th 1942.

I have not yet been able to get a report from my surveyors. I have not even been able to see them. The following are my own figures and estimates. It will take better than 3 months and 100,000£ Austr. to make her into a serviceable ship and it will take 150,000£ Austr. and 5 months to put her back in Class. This is leaving out all salvage expenses. I have not over-estimated either time or cost.

1920

You may make any use of anything I have said in this letter to my owners or anyone else.

I wish you would—at deferred rates—send my owners as much of my report in this and my last letter and as much of my proposal for a settlement as you think necessary to give them a fair estimate of the situation. We shall try to set the ball rolling and keep it so until a settlement is reached.

Yours very truly,

Axel Michelson

Libelant's Trial Exhibit 46, 1921

Deposition Exhibit 44.

Written by himself

SS. *"Portmar"*

Preliminary by Lieut. Comm. A. G. Horne

DYNAMO ENGINES—Engines in fair order, generating sets were out of line of water, being installed on upper platform above main engines.

ARMATURES—Armatures were taken out of ship, dryed- 1922
out and tested and found in good order.

ELECTRIC WIREING—Wireing through ship in bad condition, ship need complete re-wireing.

Tanks under boiler. These tank tops have rusted through, in very bad condition.

AUXILLARIES—All gear and valves frozen up, pumps in bad order.

CONDENSER—Fouled on both steam and water side, needs thoroughly overhauling & cleaning

WINCHES—Very bad condition, also steam and Exhaust 1923
lines bad.

STEERING ENGINE & TELEMOTOR—Steering engine in fair condition, need a deal of attention, hand gear bevel wheels have been broken, these need new ones. Telemotor piping needs all overhauling, as it is in bad condition.

MAIN ENGINES—Engines had been submerged in salt water causing extensive corrosion in bearing journals etc. Dirt and oil had gone completely through engines, mud and sand and other abrazives, causing bearings—Pistons—valves etc to seize, link motion, eccentric and gear frozen up. Engines require extensive overhaul.

SHAFTING—Crank shaft was disconnected abaft No. 6 bearing and found to be 40/1000 out of alignment, it ap-

1924 *Libelant's Trial Exhibit 47.*

pears that ship has been strained, causing this faulty alignment.

Only tank top under boiler inspected, after tanks tops had not been cleaned, still covered with oil & mud.

THRUST—Needs remetalling, and thoroughly cleaning out, it is in fair order.

TUNNEL SHAFTING—Seized in bearings and out of alignment, journals and shaft pitted.

BOILERS—Boilers examined externally and found to be in
1925 fair condition. Boiler mountings in bad condition owing to salt water, sand - mud etc covering them. One boiler only (Centre) was examined internally, this boiler was found in fair condition; All stays & tubes were tested, also combustion chambers. Port & Starboard boilers not opened up at time of inspection.

Libelant's Trial Exhibit 47.

Deposition Exhibit 45.

1936 SURVEY REPORT

R. Douglas Taylor
Marine Surveyor
Claims Adjuster
Ship Valuator
Measurer and
Compass Adjuster
Brisbane
Cable Address "Rolyat"
Codes Used: A. B. C. 5th Edition
Telephone B 6435

Surveyor to
the
British Corporation Registry.
American Bureau of Shipping
Det Norske Veritas

SS. *"Portmar"*

Date of Survey started 14/8/'42.

THIS IS TO CERTIFY that we the undersigned Marine Surveyors did at the request of Captain Axel Michelson (Master) and Messrs. Dalgety & Co. Ltd., of Brisbane

Libelant's Trial Exhibit 47.

(agents) attend on board the American Steel single screw Steamship "*Portmar*" of New York, Off. No. 219283, and 5550 gross tons, lying afloat at the Government Railway Wharf at Pinkenba and later at the Milling Co's Wharf, South Brisbane, on the 14th day of August, 1942, and subsequent dates, for the purpose of surveying said steamer on behalf of the above named Master and the Owners, the Calmar Steamship Corporation of 25 Broadway, New York, N. Y. U. S. A.

From our interview of the Master and examination of his Log Book and extended protest noted in Melbourne Vic. on the 2nd. day of April, 1942, it would appear, that the steamer on the 15th and 16th days of February this year, while in a convoy in the Timor Sea, and more especially on the 16th of February, was heavily bombed by enemy bombers, and that on that date twenty three heavy bombs were dropped in the immediate vicinity or very close to the vessel, and that the ship again on the 19th of February, while anchored in Port Darwin, was attacked by enemy aircraft and then so severely damaged by concussion from bombs, machine gun and cannon fire, that she could no longer be kept afloat, but was by the Master run into shallow water where she foundered. More than half the ship from the bridge to the stern including engine and boiler rooms being submerged at high water twice daily. Eventually after being so submerged for two months, more or less, the hull was made tight, pumps fitted and the water pumped out. After the ship had been floated she was towed from Darwin to Brisbane by one or more tugs. She arrived at Brisbane about noon on 27th July, and was made fast to the wharf at Pinkenba. Later on, or about 16th of August, she was moved to wharf in South Brisbane as above named. For further particulars up to and including Feb. 19th see Log Book and extended protest.

On the 14th of August, 1942, we commenced this survey. No other repairs or improvements to the vessel from the time she foundered until we first boarded her, seem to have

1930 *Libelant's Trial Exhibit 47.*

been effected than the plugging up of the holes in the shell plating. Most of the cargo had been taken out, but at least a small quantity of the original cargo was left, while it would seem, as if coal had been taken in in No. 2 Hold and salted hides in No. 1, before she left Darwin on her tow to this port.

As the steamer is not, and cannot in this port be placed in dry dock, a complete survey will be impossible. It has indeed been extremely difficult to make any survey at all on account of fuel oil, mud and filth covering nearly every
1931 part of the vessel, which has been submerged. Although no draft marks can be read the ship appears at the present time to be in a trim of about 10 feet forward and 14 feet aft without any list.

With most of the hull on the starboard side below the wharf this side cannot be closely examined. No sign of damage could be seen on the upper and exposed part of shell plating. On the port side of the hull we counted 81 holes caused by machine gun and cannon fire. As each hole could not be marked when counted, there is the possibility of the number being slightly in error, up or down. These holes were all between fire room bulkhead and aft peak
1932 bulkhead opening into fire room, engine room and No. 4 and 5 Holds. The holes were various sizes and shapes from the size of a heavy caliber machine gun bullet to ragged, irregular shell holes 5 to 7 inches across. In the third range from sheer strake and the eighth plate from aft we counted 16 holes small and large. A number of plates on the port side have been set in, presumably by concussions. Forward of the bridge little damage seems to have been sustained by the shell plating.

From the appearance of the hull, as well as from the Master's statement, it seems that the ship while partially sunk has only rested on her starboard side aft with a heavy list to port and with the forward end of the ship always afloat and rising and falling with a range of tide of nearly 30 feet, a position which would have put a severe strain on the whole structure of the hull.

1933

The Decks in their whole length show marks of enemy fire. The steel decks for'd and aft have perforations and dents from machine gun fire, also the poop where rails, chocks and leads have been shattered or torn off. On the poop the mooring telegraph was destroyed while the sounding machine was cut off in the middle of the column and blasted away with no signs left of it. Steam pipes on the forward main deck have been cut and perforated. The boat and bridge decks (wooden decks) have in numerous places been holed and splintered and engine room skylight, and fiddley top riddled by machine gun fire, so also has 1934
funnel, fire room and engine room ventilators. The forward bridge deck and flying bridge has numerous machine gun bullet holes. Both the standard and steering compasses were destroyed by gun fire, also one of the engine telegraphs and the ships morse signalling apparatus.

The rigging and cargo gear has been badly cut up by machine gun fire, and all cargo booms with the possible exception of the No. 1's show bullet holes and tears. Three of the booms, the port No. 3 and 4 and starboard No. 5 had their topping lifts cut by gun fire, crashed to the deck and thereby caused further damage, the No. 4 carrying away ladder to boat deck and damaging the radio house, the Nos. 3 and 5 carrying away permanent awnings and awning 1935
spars.

The deck houses have been holed by gun fire, but most damage to deck houses seem to have been caused by concussion from bombs dropped immediately alongside of the ship. All quarters and accomodations in both forward and midship deck houses were found completely demolished and shattered. Ceiling, panelling, wainscoting and doors having in most of the quarters been blasted or torn out of their places and all furniture, lockers, cabinets and shelves shattered in all directions. The radio house, which also contained the hospital has been blasted off its foundation and parts of its sides blown out. The wheel house although in a much less degree than the radio house shows damage from concussion.

1936 *Libelant's Trial Exhibit 47.*

Crews quarters aft under the poop with all the fittings and furnishings therein are damaged beyond repair by fuel oil and by long submersion in muddy water.

No. 1 Hold and tween deck could not be surveyed on account of cargo therein.

No. 2 Hold and tween deck appeared to be in fair condition but could not be minutely surveyed.

In Nos. 4 & 5 Holds and tween decks all wood work, ceiling on tank tops, cargo battens and hatches, were found damaged beyond repair by fuel oil, sides, bulkheads tank
1937 tops and bilges all covered and filled with fuel oil and mud.

Forward part of shelter deck found in fair condition while the aft part which on the port side contains the ice machine room, refrigerating room and chilling chamber besides a domestic water tank, could not on account of fuel oil and filth be properly surveyed. It could be seen, however, that all wood work and insulation in refrigerating room and chilling chamber had been damaged beyond repair. The ice machine has been damaged by gun fire, but the extent of the damage cannot be ascertained before a clean-up has been made. In the aft end of the shelter deck on the starboard side is the engineer's machine shop and another
1938 domestic water tank. With the exception of stationary benches and a lathe the machine shop has been emptied of everything in the line of tools, machines, electric drills and an acetylene welding outfit which the shop, according to the Masters statement, contained.

All anchors and chain cables as specified in the Ships Inspection Certificate were seen on board ship. Starboard bower anchor with two shots of chain was found on starboard side of main deck forward, and a kedge anchor was hanging over starboard side amidships.

The condition of the engine room and fire room, which have been for about two months filled with muddy and oily salt water twice daily was such as to make a complete survey in detail of engine, boilers and auxiliaries impossible.

Libelant's Trial Exhibit 47.

Main engine showed extensive corrosion in bearings, journals, etc. dirt and oil have gone completely through engines, mud, sand and other abrasives causing bearings, pistons and valves to seize. Link motion, eccentrics and gear frozen up. Engines will require very extensive overhaul and repair. 1939

Thrust needs thorough cleaning, overhaul and re-metalling.

Crank shaft was disconnected abaft No. 6 bearing and found to be 40/1000 out of alignment. It appears ship has been strained, causing this faulty alignment. 1940

Tunnel shafting seized in bearings and out of alignment, journals and shaft pitted.

Boilers examined externally and found to be in fair condition. Boiler mountings are in bad condition owing to salt water and mud. One boiler only—the centre one—was examined internally. This boiler was found in fair condition. All stays and tubes were tested, also combustion chambers.

Port and starboard boilers not opened up at time of inspection.

Tank tops under boilers almost corroded through and in very bad condition. These were the only tank tops which were, or could on account of conditions, be examined. 1941

Condenser fouled on both steam and water sides, needs thorough cleaning and overhauling.

Auxiliaries: All gear and valves frozen up. Pumps in bad order. Dynamo engines in fair order, generating sets were above water line being installed on upper platform above main engine.

Armatures were taken out of ship, dryed out and tested and found in fair order.

Electric wiring throughout ship in bad condition. Ship needs complete re-wiring.

Winches and deck machinery in very bad condition, steam and exhaust lines also.

Steering engine found with hand gear bevel wheels broken, otherwise in fair condition.

1942 *Libelant's Trial Exhibit 47.*

Telemotor piping is in bad condition and needs thorough overhauling.

In the navigating department nothing was found of compasses, clocks, instruments, tools, charts, books or indeed anything necessary for the navigation of a ship.

With the exception of an old instrument frame all radio apparatus was found missing. The radio direction finder has been completely ruined and gutted of all its essential parts.

No fire apparatus or life saving equipment of any kind
1943 and belonging to the ship has been found on board, even boat davits have been damaged, with boat falls either missing or destroyed. Four, more or less, damaged lifeboats were indeed seen on the ship (two in No. 4 tween deck) but all had previously belonged to other ships.

With the exception of the lines and wires actually used in mooring the ship to the wharf and seven tarpaulins, no Mate's, Bos'n's or carpenter's stores or equipment were found on board.

In the Steward's department, with the exception of a damaged galley stove, no stores or equipment were found. Nothing in the line of bedding, blankets, linen, tableware,
1944 cooking utensils, galley, bakers or butchers equipment found on board.

We have by the Master been asked to give our estimate of cost and time to give the s.s. "*Portmar*" such repairs as would regain for her her former Classification. We estimate this cost to be approximately £120,000 Australian. (One hundred and Twenty Thousand Australian Pounds). This does not include any salvage expenses or expenses of any kind incurred by ship prior to our survey. It is to be understood that this is only a fair estimate of cost of such damage as we have seen and that further examination of the ship in dry dock may reveal damage which could not be included. It must also be kept in mind that the ship cannot be repaired in this port and that considerable expenses will be incurred in order to bring the ship to a final port of repair. Such

Libelant's Trial Exhibit 48.

expenses we have included. In giving the estimate we have given consideration to present high cost of labour and materials and we have also made comparisons with costs of near similar cases.

As to the time element we cannot under present conditions give an opinion. It would under the best of condition require months.

Given by us at Brisbane this 19th day of September, 1942.

R. DOUGLAS TAYLOR,
Marine Surveyor.

A. G. HORNE,
Marine Surveyor.

(ENVELOPE)

OFFICE OF NAVAL ATTACHE
MELBOURNE, AUSTRALIA

(stamp)
Washington, D. C. 9
Oct 21
6 30 P M
1942

Passed by Naval Censor

H. W. Warley Esq.,
President
Calmar Steamship Corporation
25 Broadway
NEW YORK

If Not Delivered Within Seven Days, Return to
46 QUEEN STREET, MELBOURNE, C.1.

Libelant's Exhibit 48.

Captain Michelson's account of disbursements with vouchers annexed. To be separately submitted to the Court.

1948

Libelant's Trial Exhibit 49.

Deposition Exhibit Underwriters A.

Copy.

LLOYD'S REGISTER OF SHIPPING.

(Lloyd's Register of Shipping)
Port Sydney. N. S. W.

15th February 1943.

This is to Certify that A. J. McCowan & Jas. C. Erskine
1949 the undersigned Surveyors to this Society did at the request of Messrs. Port Line Ltd., Lloyd's Agents, attend upon the S.S. *"Portmar"*, 5551 tons gross, of New York, afloat at Brisbane on the 3rd September 1942 and subsequently after her arrival at Sydney 24th November 1942, for the purpose of examining the vessel for damage stated to have been caused by enemy action in February 1942.

From extracts of Protest by the Master, Captain Axel Michelson and from information supplied it would appear that on the voyage from Darwin to Koepang, Timor, the vessel was attacked by enemy aircraft on the 15th & 16th February 1942, that after returning to Darwin on the 18th February she was again attacked in that port and sustained
1950 considerable damage which in the opinion of the Master made it necessary to beach the vessel, as the machinery spaces and after holds were flooded.

The vessel was subsequently refloated and towed to Brisbane by arrangements between the U. S. Army and the Commonwealth Salvage Board.

(These signatures on 3 of 4 pages.) (sgd.) A.J.McC.
" J.C.E.
" D.S.C.

This Certificate is issued upon the terms of the Rules and Regulations of the Society, which provide that:

"While the Committees of the Society use their best endeavours to ensure that the functions of the Society are properly executed, it is to be understood that neither the Society nor any Member of any of its Committees is under any circumstances whatever to be held responsible for any inaccuracy in any report or certificate issued by the Society or its Surveyors, or in any entry in the Register Book or other publication of the Society, or for any error of judgment, default or negligence of any of its Committees or any Member thereof, or the Surveyors, or other Officers or Agents of the Society."

Libelant's Trial Exhibit 49.

The work of reconditioning and repairs was carried out as far as practicable at Brisbane and the vessel then proceeded to this port, under her own power, for dry docking and completion of repairs; sufficient to make her seaworthy and serviceable for the requirements of the United States Army Authorities.

For particulars of the work carried out at Brisbane, see Reports issued by Lloyd's Register Surveyor at that port dated 29/9/42 and 19/11/42.

For particulars of the damage found in dry dock at Sydney, see Report issued by Lloyd's Register Surveyor at this port dated 13/1/43.

In compliance with instructions, the undersigned attended on board the vessel from time to time and, in making survey of the damage and of the repairs being effected, conferred with Mr. D. S. Carment, Associate Naval Architect of Messrs. Cockatoo Docks & Engineering Co. and Messrs. Howell & Gibson, Surveyors for the American Bureau of Shipping, with a view to agreeing upon the extent and cost of repairs allocated—without prejudice—against enemy action damage, wear and tear, alterations and additions, etc.

The accounts shown in the attached statement have been checked and, under present conditions obtaining at Australian ports, are considered reasonable.

Their allocation under the separate headings is concurred in and, adopting these figures, it is considered that:—

(1.) The cost of all damage repairs necessary to restore the "*Portmar*" to the condition she was in prior to being bombed in the Timor Sea and at Darwin in February 1942 would amount to approximately £28,000, Australian Currency, which figure includes the amounts to cover outstanding items mentioned in clause 3(d).

(2.) The cost of all repairs effected at Brisbane and Sydney to recondition the vessel in the manner specified by

1954 *Libelant's Trial Exhibit 49.*

the United States Army would amount to approximately £34,000 (Australian Currency.) This figure includes damage by enemy action, alterations and additions., defence equipment and wear and tear repairs, as per attached statement, and additional accounts yet to be rendered.

(3.) (a) In determining the above costs the accounts submitted by the United States Army have been examined and are considered reasonable under present conditions.

(b.) The value of materials and supplies utilised in
1955 reconditioning the vessel and obtained from S.S. *"Rufus King"* is—as shown in attached statement—£3170. 17. 3.

(c.) The only damage repairs now effected which might be considered inadequate for reinstating the vessel to the same condition as she was prior to being bombed in the Timor Sea in February 1942, are the welding of plate patches over the holes in shell plating, decks etc. The cost of this work as carried out at Brisbane would be in the vicinity of £600.

(d). The cost of outstanding repairs to vessel's bottom in dry dock as detailed in Sydney Report dated 13/1/43
1956 would amount to approximately £2000.

The cost of repairing the damaged shell and deck plating in such a manner as to cause no disfigurement to, or depreciation in the value of the ship and reinstate these parts in as good a condition as before the damage, would amount to approximately £1500.

With reference to the attached statement of costs, it is understood that additional accounts for repairs effected are yet outstanding.

These are as hereunder:

(1) Wireless installation, estimated at approx. £1250.

(2) Three lifeboats " " " £1500.

Libelant's Trial Exhibit 49.

(3) Top mast back stays (ex "Westralia") estimated at approx. £17.

(4) Bullivant wires etc. estimated at approx. £123.

(5) 15 K. W. generating set for wireless estimated approx. £450.

All the above figures are in Australian Currency, items 1 and 2 being allocated against damage by enemy action and items Nos. 3, 4 and 5 allocated to alteration and additions. The estimated cost of these items are included in the totals given above and their allocation is also concurred in without prejudice to any subsequent adjustments.

(sgd.) A. J. McCowan
" Jas. C. Erskine
Surveyors to Lloyd's Register.

We concur with the above report and attached statement.

(sgd.) D. S. Carment
Associate Naval Architect
Cockatoo Docks & Eng. Co. Pty. Ltd.

(sgd.) W. Y. Howell
Surveyor for
The American Bureau of Shipping.

1960

Libelant's Trial Exhibit 49.

SUMMARY OF EXPENDITURE INCURRED FOR RECONDITIONING SS. "PORTMAR"

WORK CARRIED OUT AT BRISBANE

Item No.	Source of Account	Cost of Damage Due To Enemy Action	Cost of Alteration & New Equipment	Cost of Defence Equipment	Cost of Repairing Due To Fair Wear & Tear Ships Account	Total
1	Evans Deskin & Co., Ltd. (Less £70.0.0 allowed for machine tools deducted from Ships account)	£ 4941.10.11	£ 604. 2.10	£ 852. 1. 8.	£ 180.18. 8.	£ 6578.14. 1.
2	Geo. Gilbert Elec. & Mach. Engineers	£ 609.13. 3	—	—	—	£ 609.13. 3.
1961 3	Petroleum Depot Supplies	£ 566. 5. 1.	—	—	—	£ 566. 5. 1.
4	Medical Supplies	£ 35.15. 0.	—	—	—	£ 35.15. 0.
5	U. S. Salvage Depot	£ 70. 0. 0.	—	—	—	£ 70. 0. 0.
6	Australian Salvage Corps	£ 300. 4. 4.	—	—	—	£ 300. 4. 4.
7	U. S. Signal Corps Supplies	£ 6.10. 0.	—	—	—	£ 6.10. 0.
8	Quartermaster Stores Hedley Park	£ 441. 8. 9.	—	—	—	£ 441. 8. 9.
9	Supplies obtained by Local Purchase B. S. 3	£ 1169.14. 0.	—	—	—	£ 1169.14. 0.
10	Berthage Account John Burke	£ 75. 1. 0.	—	—	—	£ 75. 1. 0.
11	Berthage Account Newstead Wharf	£ 167. 8. 9.	—	—	—	£ 167. 8. 9.
12	For Water Supplies by Brisbane Milling Co.	£ 36.19. 0.	—	—	—	£ 36.19. 0.
13	Macdonald Hamilton & Co. for Tugs & Watchman's Wages	£ 71.11. 6.	—	—	—	£ 71.11. 6.
14	Fish Steam Laundry De Oiling & Cleaning Laundry	£ 116. 0. 2.	—	—	—	£ 116. 0. 2.
1962 15	Hire of Passenger Gangway Aust. United Steam Nav. Co.	£ 4. 0. 0.	—	—	—	£ 4. 0. 0.
16	Evans Deakin & Co., Ltd.	—	—	—	£ 15. 7. 2.	£ 15. 7. 2.
17	U. S. War Shipping Administration Engineers Services	£ 544.17. 3.	—	—	—	£ 544.17. 3.
18	Military Personnel (Wages)	£ 3663.12.10.	—	—	—	£ 3663.12.10.
19	Estimated Value of Equipment & Stores X Rufus King	£ 1830.17. 3.	£1204.10. 0.	£ 135.10. 0.	—	£ 3170.17. 3.
20	A. U. S. N. for repairs prior to 10th September 1942.	£ 3191.15. 1.	—	—	—	£ 3191.15. 1.

WORK CARRIED OUT AT SYDNEY

21	Wilson & Stoneham Engineering Co.	£ 4.19. 6.	—	—	£1917.17. 4.	£ 1922.16.10.
22	Morts Dock & Engineering Co., Ltd.	£ 790.17. 6.	£ 43.10. 0.	—	£ 293.13. 1.	£ 1128. 0. 7.
23	Beat Bros. Pty. Ltd.,	£ 1351. 6. 5.	£ 179.17. 9.	£ 399. 8. 0.	£ 56.18. 6.	£ 1987.10. 8.
24	Charmichael Bros.	£ —	—	—	£1343. 6. 9.	£ 1343. 6. 9.
25	Brights Dock	£ 753.13. 7.	£ 502. 9. 1.	£ 552.14. 0.	£ 703. 8. 8.	£ 2512. 5. 4.
26	Fox & Lawson	£ 351. 0. 7.	£ 58.11.10.	£ 86.14. 4.	£ 320. 4. 6.	£ 816.11. 3.
		£21095. 1. 9.	£2593. 1. 6.	£2026. 8. 0.	£4831.14. 8.	£30546. 5.11.

W. Y. Howell
Surveyor for
The American Bureau of Shipping

D. S. Carment
Cockatoo Docks

A. J. McCowan
Surveyor to Lloyd's Register

1963

Libelant's Exhibit 50.

Deposition of Joseph E. Bullock, Chief Officer of S.S. *Portmar*, printed at pp. 449 to 512.

Libelant's Exhibit 51.

Excerpts from testimony of Axel Michelson, Master of S.S. *Portmar*, taken in Calmar's suit against United States in the Court of Claims, printed at pp. 513 to 540.

1964

Libelant's Trial Exhibit 52.

From

37° 45′ N through
122° 41′ W

32° 30′ N
129° 30′ W

22° 50′ N
140° 00′ W

1965

13° 50′ N
149° 40′ W

3° 45′ N
160° 00′ W

6° 00′ S
170° 45′ W

11° 50′ S
180° 00′

12° 50′ S
166° 30′ E

15° 25′ S
157° 30′ E

1966 *Libelant's Exhibit 53.*

12° 10′ S
148° 10′ E

5° 35′ S
130° 00′ E

6° 00′ N
123° 05′ E
to
destination.

1967

Libelant's Exhibit 53.

Chart showing proposed voyage according to Naval Orders, and actual route taken by S.S. *Portmar*. To be separately submitted to the Court.

Libelant's Exhibit 54.

(Complete exhibit to be separately submitted to the Court.)

1968 Syndicate monthly schedule of War Risk Rates, time and trip, to become effective 2/15/42. These rates to be in force subject to acceptance prior to 5 p.m. E.S.T. 2/13/42 and apply to sailings prior to 12:01 a.m. E.S.T. 3/1/42.

2/10/42

Voyage	Time Limit.	Rate
• • • • • •		
(27) U. S. Atlantic to Australian Ports and return		7½%
(28) U. S. Pacific to Australian Ports and return		6½%

United States Exhibit A.

NAVY DEPARTMENT

November 25, 1941

From: Commandant, Twelfth Naval District and Naval Operating Base, San Francisco, California.

To: The Master, S.S. *Portmar.*

Subject: Routing Instructions.

Enclosures: 1. General Instructions.

2. Special Warning No. 132 (Manila Bay)

3. Special Warning, Western Part Torres Straits.

Ship's Data: Speed of advance 10 knots.
Leaving San Francisco, Fuel for 70 days.
Leaving San Francisco, Water for 30 days.
With evaporators working, it is presumed water supply will be ample for entire voyage.

Note: Fresh water obtainable at Suva, Port Moresby and Amboina Island.

Gross Tonnage, 5550.

Voyage No. 39.

1. In accordance with your sailing instructions from the Calmar Steamship Company on November 27, 1941 and when ready for sea, you will sail from San Francisco for Manila, P.I., via Torres Straits, Molukka Passage, Bangka Passage and Basilan Straits. Pilots are now available at Port Moresby for vessels westbound through Torres Straits. Masters desiring the services of a pilot will make arrange-

ments at a U. S. Navy Routing Office or with a Naval Observer before departing from the last port of call.

2. Pass through the following named points:

IRON	—Latitude	Longitude
STEEL	—Latitude	Longitude
LEAD	—Latitude	Longitude
ZINC	—Latitude	Longitude
ALUM	—Latitude	Longitude
NICKEL	—Latitude	Longitude
1973 BRASS	—Latitude	Longitude
GOLD	—Latitude	Longitude
METAL	—Latitude	Longitude
BURR	—Latitude	Longitude
SLACK	—Latitude	Longitude

The master is responsible for the safety of his ship and will adjust the courses between the above named positions to avoid navigational dangers.

3. Maintain radio silence at sea except for:

a. Cases of real emergency affecting the safety of
1974 the ship. Use forms of procedure given in CSP 937 if applicable to the emergency.

b. Messages necessary for the purpose of making contact with Naval escort.

4. Darken ship after passing 160° 00′ West.

5. In the event it becomes necessary to call at Suva, Fiji Island, contact the U. S. Naval Observer and request him to advise the U. S. Naval Attache at Melbourne of your expected date and hour of arrival off Port Moresby.

1975

6. Upon arrival at Manila turn in these routing instructions to the Port Director, Naval Transportation Service and obtain a receipt.

J. W. GREENSLADE
Commandant.

T. D. Ross
By Direction.

Received:

AXEL MICHELSON,
Master.

1976

Copies to: (Less Enclosure 2 & 3)

(2) Chief of Naval Operations.
(1) Commander-in-Chief, Pacific Fleet.
(1) Commander-in-Chief, Asiatic Fleet.
(1) Commandant, Fourteenth Naval District.
(1) Commandant, Sixteenth Naval District.
(1) Port Director, (NTS) Manila, P.I.

1977

(2) Naval Observer, Wellington, N.Z.
(1) Naval Observer, Suva, Fiji Islands.

GENERAL INSTRUCTIONS SS *Portmar*—VOY. #39
Enclosure #1

1. The master is reminded that he is at all times responsible for the safe navigation of his ship.

2. Provide for the security of routing instructions and other secret or confidential papers or publications on board. Do not allow unauthorized persons to have access to them.

1978 *United States Exhibit A.*

3. If it becomes necessary to alter your route while at sea, it will be done with reference to one or more of your named positions. An example of such a use is:

"Pass one hundred miles North of position IRON".

4. When in company with a Naval Escort the senior officer of such escort is responsible for sending and receiving all radio messages. No radio messages will be sent without his authority.

1979 5. If at any time during your voyage it appears probable that your ship might be searched by Axis ships, destroy these routing instructions and all secret and confidential codes and publications in your possession.

6. *Should war start while on your voyage:*

(A) *If in Port,* act in accordance with CSP 937, paragraphs 3 (a), 3 (b) and 22. If in a foreign port, the U. S. Consul should be consulted before proceeding to sea.

(B) If at Sea:

1980 (a) Darken ship from sunset to sunrise. It is suggested that you have the ship inspected frequently to see that no lights are showing.

(b) If it is possible that submarines are present, zigzag during daylight, twilight, and on bright moonlight nights.

(c) Collect and destroy all newspapers on board, as in the event of capture, raiders often obtain valuable information from them.

(d) *Watch for war warnings.*

(e) Strict radio silence must be maintained at sea, except to make reports of the enemy or distress messages. See CSP 937 on the use of radio and the messages which can be sent.

1981

(f) If in danger of capture or destruction, destroy your routing instructions and all secret or confidential papers and publications in your possession. Routing instructions must on no account be allowed to fall into the hands of the enemy.

United States Exhibit B.

7 DECEMBER 1941

1982

FROM: RDO HONOLULU/RDO CAVITE
TO: ALL MERCHANT SHIPS

WAR EXISTS BETWEEN UNITED STATES AND JAPAN XX PROCEED CLOSEST US OR FRIENDLY PORT IMMEDIATELY

United States Exhibit C.

1983

11 DECEMBER 1941

FROM: COM TWELVE
TO: ALL MERCHANT SHIPS PACIFIC

MASTER OF FOLLOWING SHIPS MAUNALOA HARRYLUCKENBACH JANECHRISTENSEN PORTMAR X PROCEED SUVA FOR FURTHER INSTRUCTIONS

1984

United States Exhibit D.

Certified duplicate original extracted from record on file at US Coast Guard Headquarters.

EDW C CLEAVE
Capt. EDW. C. CLEAVE, USCG
Chief, Merchant Vessel Inspec. Div.

N.C.G. 2692
(Rev. Sept. 1941)

Form 924
Department of Commerce
Bureau of Marine Inspection and Navigation
(Rev. Sept. 1941)

1985

Report of Marine Casualty (or Accident)

(20 Stat. 164, 18 Stat. 125-128, 38 Stat. 1184; R. S. 4405, 4448, 4450; 14 U. S. C. 91; 33 U. S. C. 361, 362, 363, 365, 366; 46 U. S. C. 375, 234, 239)

Date submitted 26 March, 1943.

Customs District San Francisco.

U. S. Local Inspectors, Port of San Francisco.

1986

1. Name of vessel "*Portmar*".

2. (*a*) Nationality American.

(*b*) Rig Steam Screw.

(*c*) Official No. 219 283.

3. Type of vessel and trade or service Cargo-Freight.

4. Home port, or port where numbered, if motorboat New York.

5. Gross tonnage (070) 5550.

6. Year built 1919.

United States Exhibit D. 1987

7. Hull materials Steel.

8. Name and residence of master Axel Michelson 2306 Waverly St., Oakland, Calif.

9. Name and residence of owner (or agent) Calmar Steamship Corporation 25 Broadway New York.

10. Date and port of last inspection October 1941 Baltimore, Md.,

11. Radio equipment of vessel: Telephone or telegraph. 1988

12. Last port of departure San Francisco.

13. Date of departure Nov. 27, 1941.

14. Where bound Manila, P. I.,

15. (*a*) Number of passengers (0800) 3.

(*b*) Number of crew (0900) 35.

(*c*) Number of others no.

16. Estimated value of vessel (1200), $ unknown. 1989

17. Value of cargo (1300), $ unknown.

18. Any deck load? Yes.

19. Weight of cargo (long tons) Aprox. 2500.

20. Nature of cargo Military supplies and equipment.

21. Date and exact time of casualty (specify time standard) Feb. 19, 1942 2:12 P.M.

22. Exact locality of casualty: Lat. 12° 34′ S Long. 130° 52′ E Or distance and bearing (true) from charted object when applicable (160)

1990 *United States Exhibit D.*

23. Nature of casualty (check one or more of the following—see Note 1):

- ☐ Foundering .....(1701)
- ☐ Stranding .....(1702)
- ☐ Grounding .....(1702)
- ☐ Collision with vessel (give name and hailing port of colliding vessel) .....(1703)
- ☐ Fire .....(1705)
- ☐ Engine or machinery trouble .....(1706)
- ☐ Capsizing .....(1707)
- ☐ Collision with object other than vessel or ice (name object) ....(1708)
- ☐ Collision with ice..(1709)
- ☐ Masts, sails, and other equipment damage .....(1711)
- ☐ Waterlogged, leaking, etc. .....(1714)
- ☐ Heavy weather damage .....(1715)
- ☒ Loss or damage from air raids.....(1716)
- ☐ .....( )

1991

24. Cause of casualty (explain fully) Japanese air attack .....(18)

25. Wind direction and force, weather, sea, and visibility West NW 2—Weather fine—Sea slight visibility good.

1992

26. Number lives lost: (*a*) Passengers (1000) ?

(*b*) Crew (1100) 1

(*c*) Others.....

27. Number persons injured: (*a*) Passengers ?

(*b*) Crew 10.

(*c*) Others .....

28. Estimated loss or damage—to vessel (see note (2)) (1400), $450,000. Aprox.; to cargo (1500), $?

29. Amount of insurance—on vessel, $? ; on cargo, $?

United States Exhibit D.

1993

30. State in detail measures taken to avoid casualty:

(*a*) Navigation, piloting, and use of navigational aids Beached vessel to avoid sinking.

(*b*) Communications .....

31. By whom and to what extent assistance was rendered:

(*a*) Communications (name stations) .....

(*b*) U. S. Coast Guard (name vessels, stations, units, etc.) .....

1994

(*c*) Other means (vessels, etc.) .....

32. Was auto-alarm signal transmitted by your vessel?

33. Did casualty result from the presence of explosives, inflammables, or other dangerous cargo? (For definition of above see "Explosives or Other Dangerous Articles on Board Vessels" containing the regulations prescribed by the Secretary of Commerce, April 9, 1941) No.

34. Remarks (include names of those who lost their lives, if any): Thomas Tyrrell, A.B.

1995

(Signed) AXEL MICHELSON
Title Master

Subscribed and sworn to before me, an officer authorized to administer oaths, this 26th day of March, 1943.

Signed S. A. KENNEDY
Title Hearing Officer

[SEAL]

* See instructions below stating when form must be sworn to. (Filing instructions omitted.)

1996

United States Exhibit E.

Certified true photostatic copy of original on file at U. S. Coast Guard Headquarters.

EDW. C. CLEAVE
Capt. EDW. C. CLEAVE,
Chief, Merchant Vessel Inspection Div.

N.C.G. 2692
(Rev. Sept. 1941)

Form 924
Department of Commerce
Bureau of Marine Inspection and Navigation
(Rev. Sept. 1941)

1997

Report of Marine Casualty (or Accident)

(20 Stat. 164, 18 Stat. 125-128, 38 Stat. 1184; R. S. 4405, 4448, 4450; 14 U. S. C. 91; 33 U. S. C. 361, 362, 363, 365, 366; 46 U. S. C. 375, 234, 239)

Date submitted: July 6, 1942.

Customs District No. 10.
U. S. Local Inspectors, Port of New York.

1. Name of vessel *"Portmar"*.

1998 2. (*a*) Nationality U. S. A.

(*b*) Rig Steam.

(*c*) Official No. 219283.

3. Type of vessel and trade or service Single screw cargo.

4. Home port, or port where numbered, if motorboat New York.

5. Gross tonnage (070) 5550.

6. Year built 1919.

7. Hull materials Steel.

United States Exhibit E.

1999

8. Name and residence of master Axel Michelson, 2306 Waverly St., Oakland, Calif.

9. Name and residence of owner (or agent) Calmar Steamship Corp., 25 Broadway, New York City.

10. Date and port of last inspection October 9, 1941, Baltimore, Md.

11. Radio equipment of vessel: Telephone or telegraph —telegraph.

2000

12. Last port of departure Darwin, North Australia.

13. Date of departure February 14, 1942.

14. Where bound Koepang, Timor, but returned to Darwin because of Enemy attack—arriving about noon February 18.

15. (*a*) Number of passengers (0800) .....

(*b*) Number of crew (0900) 35.

(*c*) Number of others about 300 soldiers.

2001

16. Estimated value of vessel (1200), $860,000.

17. Value of cargo (1300), not known.

18. Any deck load? Yes.

19. Weight of cargo (long tons) unknown.

20. Nature of cargo Gasoline and Military Equipment of the Field Artillery aboard.

21. Date and exact time of casualty (specify time standard) February 19th, 1942.

2002 *United States Exhibit E.*

22. Exact locality of casualty: At Port-Darwin, North Australia in a small cove southward of Channel Island. (160)

23. Nature of casualty (check one or more of the following—see Note 1):

- ☐ Foundering .....(1701)
- ☐ Stranding .....(1702)
- ☐ Grounding .....(1702)
- ☐ Collision with vessel (give name and hailing port of colliding vessel .....(1703)
- ☐ Fire .....(1705)
- ☐ Engine or machinery trouble .....(1706)
- ☐ Capsizing .....(1707)
- ☐ Collision with object other than vessel or ice (name object) ....(1708)
- ☐ Collision with ice..(1709)
- ☐ Masts, sails, and other equipment damage .....(1711)
- ☐ Waterlogged, leaking, etc. .....(1714)
- ☐ Heavy weather damage .....(1715)
- ☒ Loss or damage from submarines, air raids, mines .....(1716)
- ☐ ——— ( )

2003

2004

24. Cause of casualty (explain fully) Bombing, machine gunning from Enemy Planes.

25. Wind direction and force, weather, sea, and visibility, weather clear, sea calm, visibility good.

26. Number lives lost: (*a*) Passengers (1000).....

(*b*) Crew (1100) One.

(*c*) Others not known.

27. Number persons injured: (*a*) Passengers

(*b*) Crew Twelve.

(*c*) Others not known.

28. Estimated loss or damage—to vessel (see note (2)) (1400), $860,000; to cargo (1500), not known.

29. Amount of insurance—on vessel, $860,000; on cargo, not known.

30. State in detail measures taken to avoid casualty:

(*a*) Navigation, piloting, and use of navigational aids Vessel beached in order to prevent its sinking or capsizing in the harbor.

(*b*) Communications 2006

31. By whom and to what extent assistance was rendered:

(*a*) Communications (name stations)

(*b*) U. S. Coast Guard (name vessels, stations, units, etc.) HMAS *Vigilant*—Gunboat *Gunbar*.

(*c*) Other means (vessels, etc.) 148th F.A. Regiment, U. S. Army, Had guns upon vessel's decks and fired upon Enemy.

32. Was auto-alarm signal transmitted by your vessel? 2007
Not necessary.

33. Did casualty result from the presence of explosives, inflammables, or other dangerous cargo? (For definition of above see "Explosives or Other Dangerous Articles on Board Vessels" containing the regulations prescribed by the Secretary of Commerce, April 9, 1941)—No.

34. Remarks (include names of those who lost their lives, if any): The *Portmar* was ordered to Darwin, where she loaded the 148th F. A. Regiment, U. S. Army and equipment, and proceeded toward Timor, but was ordered back by the USS. *Houston* after a bombing attack on February

2008 *United States Exhibit F.*

15, arriving back in Port Darwin, February 18. February 19 Port Darwin attacked, Ship damaged & in order to prevent capsizing ship was beached. Thomas Tyrrel, A.B., a member of the crew & several soldiers, named unknown, were killed.

(Signed) H. W. WARLEY
President

Calmar Steamship Corporation
(Title) Owners

2009

* Subscribed and sworn to before me, an officer authorized to administer oaths, this ..... day of ....., 19.....

Signed .....

Title .....

(SEAL)

* See instructions below stating when form must be sworn to. (Filing instructions omitted.)

2010

United States Exhibit F.

Mr. C. B. Yule's estimate, dated October 26, 1950, of cost of repairs of S.S. *Portmar* if made in the United States, to put the S.S. *Portmar* back in class, based on his examination of Libelant's Exhibit 47. To be separately submitted to the Court.

2011

Underwriters' Exhibit 1.

Deposition of Roy J. M. Merrett, printed at pp. 541 to 554.

Underwriters' Exhibit 2.

Testimony of English Underwriters Obtained by Commission, printed at pp. 555 to 579.

2012

Underwriters' Exhibit 3.

AMERICAN MARINE INSURANCE SYNDICATES

99 John Street, New York 7

January 12th, 1940.

Mr. DOUGLAS F. COX, Chairman
Mr. HAWLEY T. CHESTER
Mr. ROBERT R. DWELLY
Mr. ERIC E. ELLIS
Mr. SAMUEL D. MCCOMB
} Policy Form Committee.

2013

Gentlemen:

Syndicate War Risk Clauses
Free of British Capture Clause.

The Board of Managers at their meeting of December 21st last left to your Committee the matter of conferring with Mr. Englar and amending the above mentioned clause to cover while being detained for inspection by the British similarly to what has been done with the cargo clause.

2014 *Underwriters' Exhibit 3.*

Your approval is asked to the following clause which Mr. Englar has redrafted:

"Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain, France or any of their dominions, colonies, possessions or allies; but unless the insured
2015 Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention":

which will be used in conjunction with the Syndicate War Risk Clauses where a vessel destined to the war zone is insured against war risks.

2016 Kindly indicate your approval of the clause as drawn or if it is desired to have a meeting and discuss this matter further with Mr. Englar same will be arranged.

Yours very truly,

(Signed) D. C. ANDERSON
Underwriter.

Certified Copy

S. D. LIVINGSTON,
Secretary.

Jan. 19, 1951.

Underwriters' Exhibit 4.

2017

STATE OF NEW YORK
COUNTY OF NEW YORK

S. DONALD LIVINGSTON being duly sworn deposes and says—

THAT he is now Secretary of the American Marine Hull Insurance Syndicate and that in that capacity has intimate knowledge of the records of the Hull Syndicate and its predecessor, the American Marine Insurance Syndicates.

THAT in the records of the American Marine Insurance Syndicates there is the official report of the Meeting of the Board of Managers of the Syndicates, dated January 18th, 1940, an extract of which follows: 2018

Extract from Minutes of the Meeting of the Board of Managers Held Thursday, January 18, 1940.

AMERICAN MARINE INSURANCE SYNDICATES

"Minutes of the regular monthly meeting of the Board of Managers of the American Marine Insurance Syndicates, duly called and held at 99 John Street, in the City of New York, on Thursday, January 18, 1940, at 11:20 A. M. 2019

Present:	Represented by:
Aetna Insurance Company	Mr. M. W. Morron
Atlantic Mutual Insurance Company	Mr. W. D. Winter
Boston Insurance Company	Mr. W. R. Hedge
British & Foreign Marine Insurance Co.	Mr. E. E. Ellis
Continental Insurance Company	Mr. S. D. McComb
Federal Insurance Company	Mr. Percy Chubb
Fireman's Fund Insurance Company	Mr. F. B. McBride Mr. C. R. Page
Globe & Rutgers Fire Insurance Company	Mr. J. T. Byrne

2020 *Underwriters Exhibit 4.*

Great American Insurance Company	Mr. J. W. Baker
Hartford Fire Insurance Company	Mr. J. S. Gilbertson
Insurance Company of North America	Mr. H. H. Reed Mr. R. R. Dwelly
Providence Washington Ins. Co.	Mr. J. C. Keegan
Royal Insurance Company	Mr. F. B. Zeller
St. Paul Fire & Marine Insurance Co.	Mr. H. Jackson
Westchester Fire Insurance Company	Mr. D. F. Cox

2021 There were also present: Messrs. Harwood, Anderson, McAlinden; and Mr. B. K. Ogden of the U. S. Maritime Commission.

The meeting was called to order by the Chairman, Mr. Harwood."

* * * * * * *

The Policy Committee further reported—

"Your Committee, requested to consider amendment to the Free of British Capture Clause to conform with change made in the same clause of the Cargo War Risk Clauses, which covers while being
2022 detained for inspection by the British, have considered the matter and with the advice of counsel adapted the wording of the cargo clause for use in insuring war risk on hull interests and recommend that the following clause be approved for use with the Syndicate War Risk Clauses in insuring war risk on vessels navigating in the war zone.

'Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain, France or any of their dominions, colonies, possessions or allies; but unless the

insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines, or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention:' ''

Motion was made, seconded and duly carried—

To accept the report of the Policy Committee, adopting 2024
the Free of British Capture Clause (above) as an approved form for use by the War Risk Committee where, in their judgment, they find it proper to do so.

THAT the deponent states that the only pertinent parts of the Minutes of that Meeting relative to the F. C. & S. Clause is that portion which has been given above in quotation.

FURTHER the deponent saith not.

S. D. LIVINGSTON
Secretary.

New York, January 18, 1951. 2025

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

On this 18th day of January 1951 before me appeared S. D. Livingston, known to me be the Secretary of the American Marine Hull Insurance Syndicate who, being duly sworn, acknowledged that he executed the foregoing document, on behalf of the said Syndicate on the 18th day of January 1951.

GEORGE A. McCAULEY
Notary Public.

GEORGE A. McCAULEY
Notary Public, State of New York
No. 30-2456100
Qualified in Nassau County
Cert. filed with N. Y. Co. Clerk & Register
Term Expires March 30, 1951

(NOTARIAL SEAL)

2026

Underwriters' Exhibit 5.

AMERICAN INSTITUTE OF MARINE UNDERWRITERS
99 John Street
New York

July 18th, 1940

(Cut)

Cable Address: Amertute, New York
Telephone: COrtlandt 7-5195

To All Members:

War Risks—Free of Capture Clause
Revised Forms, Etc.

2027

The American Cargo War Risk Reinsurance Exchange has substituted for the existing F. B. O. Clause incorporated in Open Policies, Special Policies and Certificates, the following clause:—

"Notwithstanding anything to the contrary contained herein, it is understood and agreed that all shipments which are shipped to or from or transhipped at any port or place outside of the United States, its incorporated territories and its possessions in the Western Hemisphere, are warranted free
2028 of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in co-operation with or under the control of them or any of them; but unless the insured property is condemned this warranty shall not exclude losses otherwise covered by this policy which occur while the property insured is on board the overseas vessel and which are caused by gunfire, torpedoes, bombs; mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a Marine insurance policy

2029

warranted free of claims arising from Capture, Seizure or Detention".

Note: The word "France" omitted in new clause. New wording underlined.

In view of this amendment the Standing Committee on Forms and Clauses submits herewith for the use of members printed copies of the following revised forms which, as usual, can be purchased from Mr. Joseph Lazard of 237 Lafayette Street, New York, N. Y.:

2030

Free of Capture Clause No. 3. (87A-56)
Policy Form No. 2B. (87A-57)
Open Policy Form No. 2C, replacing Open Policy No. 2B. (87A-59)
Form 3H, replacing Form 3F. (87A-58)
Form 3I, replacing Form 3G. (87A-60)
Combination Forms of S. R. & C. C. Endorsements No. 2A and 3H. (87A-62) also of
S. R. & C. C. Endorsement No. 3A and 3H. (87A-61)

In view of the fact that the Free of Capture Clause is too long to be conveniently put on a rubber stamp, the following short clause, intended for use on certificates which contain the full war risk clauses, has been prepared by the Committee and approved by counsel.

2031

"All shipments which are shipped to or from or transhipped at any port or place outside of the United States, its incorporated territories and its possessions in the Western Hemisphere, are warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or by any of its dominions, colonies, possessions or allies, or by any forces acting in co-operation with or under the con-

trol of them or any of them, in accordance with American Institute Free of Capture Clause No. 3."

The following clause may be used on certificates which either do not contain any war risk clauses or on which the war risk clauses appear in an abbreviated form:

"The property described in this policy (or certificate) is also separately insured against war risks upon the terms and conditions of American Institute 1939 form of Open Policy against War Risks Only,
2033 Form No. 2-C.

Attention is called to the fact that this war risk insurance is subject to the following restrictions and warranties:

This war risk insurance is subject to the warranty against British or Allied capture, seizure, etc., as set forth in Clause No. 9 of the said Form No. 2-C.

This war risk insurance attaches at the time of loading on board the overseas vessel and terminates as provided in the said Form No. 2-C.

This war risk insurance is warranted free from
2034 any claim based upon loss of or frustration of the insured voyage or adventure caused by arrests, restraints or detainments, as provided in Clause 2 of the said Form No. 2-C.

The terms of the War Risk Insurance as above shall not be extended or modified by any of the printed terms or conditions of this policy (or certificate) or by any clause or provision stamped or endorsed hereon unless the same refers specifically to war risk insurance."

ERNEST G. DRIVER
Secretary.

No. 1246

Underwriters' Exhibit 5. 2035

American Institute
Free of Capture Clause No. 3
(July, 1940)

87A-56

Notwithstanding anything to the contrary contained in this policy (or certificate), it is understood and agreed that all shipments which are shipped to or from or transshipped at any port or place outside of the United States, its incorporated territories and its possessions in the Western Hemisphere, are warranted free of claims arising from 2036
Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in co-operation with or under the control of them or any of them; but unless the insured property is condemned this warranty shall not exclude losses otherwise covered by this policy (or certificate) which occur while the property insured is on board the overseas vessel and which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy warranted free of claims arising from 2037
Capture, Seizure or Detention.

For sale by Joseph Lazard, 237 Lafayette St., N. Y. C. Printed in U. S. A.

(Other enclosures in Underwriters' Exhibit 5 are to be separately submitted.)

2038

Underwriters' Exhibit 6.

American Institute of Marine Underwriters
99 John Street
New York 7, N. Y.

Cable Address: Amertute, New York
Telephone: COrtland 7-5195

Sept. 24th, 1940

To All Members:

Foreign Hulls—War Clauses

2039 The attached printed copy of war clauses is submitted to you by the Standing Committee on Forms and Clauses as recommended "American Institute War Clauses—Foreign Hulls"—(September 1940).

These revised clauses are in substitution of those issued with bulletin No. 1253 under date of July 31st, 1940, the only change being the addition of the following words:

"or held covered at an additional premium, if required."

Printed copies of these clauses (87A-68), as usual, can be obtained from Mr. Joseph Lazard, 237 Lafayette Street, New York City.

2040 Ernest G. Driver
Secretary

No. 1277

American Institute War Clauses 87A-68
Foreign Hulls
(Sept. 1940)

For Account Of

Steamer

At and From

to

and until completion of discharge, if vessel has cargo on board, but warranted that voyage shall be completed and all cargo (if any) discharged not later than
or held covered at an additional premium, if required.

Underwriters' Exhibit 6. 2041

Warranted that vessel shall sail from
not later than

It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.

This insurance is also subject, however, to the following warranties and additional clauses:

The Adventures and Perils Clause shall be construed as including the risks of piracy, civil war, revolution, rebellion 2042
or insurrection or civil strife arising therefrom, floating and/or stationary mines and/or torpedoes whether derelict or not and/or military or naval aircraft and/or other engines of war including missiles from the land, and warlike operations and the enforcement of sanctions by members of the League of Nations, whether before or after declaration of war and whether by a belligerent or otherwise, but excluding arrest, restraint or detainment under customs or quarantine regulations, and similar arrests, restraints or detainments not arising from actual or impending hostilities or sanctions.

The Franchise warranty in the attached policy is waived and average shall be payable irrespective of percentage and 2043
without deduction of new for old. The provisions of the attached policy with respect to constructive total loss shall apply only to claims arising from physical damage to the insured vessel.

Warranted free of any claim for delay or demurrage and warranted not to abandon in case of capture, seizure or detention, until after condemnation of the property insured. Also warranted not to abandon in case of blockade and free from any claims for loss or expense in consequence of blockade or of any attempt to evade blockade; but in the event of blockade to be at liberty to proceed to an open port and there end the voyage.

Warranted free of any claim based upon loss of or frustration of the insured voyage or adventure caused by

2044 *Underwriters' Exhibit 6.*

arrests, restraints or detainments of kings, princes, or peoples.

Warranted free from any claim arising from capture, seizure, arrests, restraints, detainments, condemnation, preemption or confiscation by the Government of the United States or the Government of any State therein, or a government, de facto or otherwise, of the country whose flag the vessel flies.

The premium paid for this insurance shall not be subject to any return for layups or otherwise.

2045 The "Breach of Warranty" clause in the printed policy is deleted and the following clause substituted therefor:

> "Held covered in the event of any breach of warranty as to date of sailing or any deviation or change of voyage, provided such deviation or change of voyage is not to a port or place which is within a Combat Area as defined by the President of the United States, and provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required."

2046 Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in co-operation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention.

For sale by Joseph Lazard, 237 Lafayette St., N. Y. C. Printed in U. S. A.

2047

Underwriters' Exhibit 7.

American Institute 87A-47
October, 1939

Notwithstanding anything to the contrary contained in this policy (or certificate), it is understood and agreed that all shipments which are shipped to or from or transshipped at any port or place outside of the United States, its incorporated territories and its possessions in the Western Hemisphere, are warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the 2048
authority of the government of Great Britain, France or any of their dominions, colonies, possessions or allies; but unless the insured property is condemned this warranty shall not exclude losses otherwise covered by this policy (or certificate) which occur while the property insured is on board the overseas vessel and which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy warranted free of claims arising from Capture, Seizure or Detention.

For sale by Joseph Lafard, 237 Lafayette St., N. Y. C. Printed in U. S. A. 2049

Underwriters' Exhibit 8.

87A-56

American Institute
Free of Capture Clause No. 3
(July, 1940)

Notwithstanding anything to the contrary contained in this policy (or certificate), it is understood and agreed that all shipments which are shipped to or from or transshipped at any port or place outside of the United States, its incorporated territories and its possessions in the Western

2050 *Underwriters' Exhibit 9.*

Hemisphere, are warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in co-operation with or under the control of them or any of them; but unless the insured property is condemned this warranty shall not exclude losses otherwise covered by this policy (or certificate) which occur while the property insured is on board the overseas vessel and which are caused
2051 by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy warranted free of claims arising from Capture, Seizure or Detention.

For sale by Joseph Lazard, 237 Lafayette St., N. Y. C. Printed in U. S. A.

Underwriters' Exhibit 9.

UNITED SALVAGE PTY. LTD. & WILLIAMS

v.

2052 THE SHIP "*Portmar*"

THE SALVAGE BOARD

v.

CALMAR STEAMSHIP CORPORATION

Judgment.

STARKE, J.:

These are salvage actions in the Admiralty jurisdiction of this Court which were by order heard together. That brought by United Salvage Pty. Ltd. & Captain Williams against the ship "*Portmar*" is an action in rem, whilst that

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brought by the Salvage Board against the Calmar Steamship Corporation, a company incorporated in the United States of America, is an action in personam, which is a rare form of action in salvage proceedings.

The actions relate to the salvage of the ship *"Portmar"* which had been beached near Channel Island in the Port of Darwin in the month of February 1942. There is no claim for salvage of the cargo, which consisted of field guns, army vehicles, equipment, ammunition, food and stores. The *"Portmar"* was a steel ship registered in the Port of New York, United States of America, of the burthen of 3,418 tons or thereabouts, 409 feet in length, 54 feet in beam and fitted with triple-expansion oil-burning engines of 2,580 i.h.p. She was owned at all material times by the Calmar Steamship Corporation and was under charter to the United States Maritime Commission. The salved value of the ship is admitted at the sum of £158,000.

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In November 1941 the ship left San Francisco bound for Manila but owing to the outbreak of war with Japan was ordered to Australia. In February 1942 the ship was at Port Darwin and left there in convoy with a regiment of United States Field Artillery, guns, equipment, ammunition, food and stores for an ordered destination. On the 16th February 1942 the convoy was attacked en route by Japanese aircraft, and, though the *"Portmar"* did not receive a direct hit, she was badly shaken by the bombs that fell around her. Ultimately the ship was ordered back to Port Darwin and proceeded there under her own power where she anchored on the 18th February. The next day Japanese aircraft attacked the ships in Darwin harbour, including the *"Portmar"*. Again she did not receive a direct hit, but the exploding bombs and gun-fire holed the hull in many places and a good deal of damage was done to compasses, boats and other parts of the ship. The ship was making water, so the anchor was weighed and the ship taken down the harbour under her own power. Troops, guns and equipment etc. were still on board. The troops

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2056 *Underwriters' Exhibit 9.*

were taken off the ship in a launch and small vessels that came alongside. The ship began to take a list, and she was beached as already stated off Channel Island in about 12 feet of water six or more miles from her anchorage. Attempts were made to plug the holes in the hull, but the list increased towards forty degrees; but on the high water that decreased to nine or ten degrees. The crew was allowed to go ashore, but the master and three of his men stood by the ship for some days, obtaining provisions out of the ship for the crew and doing other work about her. The ship
2057 was not "in a legal sense abandoned" (*The Glengyle*, (1898) P. 97, at p. 112), but there is no doubt that the master desired to get in touch with his owners and advise them to give notice of abandonment to the insurers because he thought the ship was a constructive total loss. The master and his men left Darwin on the 10th March 1942, but before that date he was for some few days subject to the direction of the American army authorities, and was not free to move at will in and about Port Darwin.

Williams the plaintiff is a sea captain highly experienced and skilled in stevedoring and salvage services. He was also the managing director of the plaintiff United Salvage
2058 Pty. Ltd. incorporated in the State of Victoria, for the purpose of rendering salvage services. In this company the plaintiff Williams holds about 20% of the capital. There are only six shareholders, some 3,000 shares have been issued. At the time of the raising of the "*Portmar*" the issued capital of this company was £4, of which Williams owned one share of £1 and three other persons each owned one share. It was in fact a subsidiary of United Stevedoring Pty. Ltd. and was formed apparently to take over the salvage services of that company, and Williams was paid a salary which covered his services to both companies.

Williams with other employees of the plaintiff company had arrived in Darwin on 13th February 1942 under arrangement with the Department of the Navy to raise, if possible, a submarine. And he was in Darwin on the 19th

February when the Japanese raided Darwin and damaged the *"Portmar"* and other ships. On the morning of the 22nd February 1942 Colonel Paterson of the American Army told Williams that one of their ships—the *"Portmar"*—was sunk some miles out of Darwin and asked him to see if he could get the guns and equipment out of her. Williams said he would. Accordingly he went out with Paterson to the *"Portmar"* and was joined by the master and mate of the ship. She was lying with her stem out of the water and her stern aground, some fourteen feet in the mud, and the water was rising towards her after deck at the time. She was listing about ten degrees to port. The fuel tanks were leaking, and the surface both in the ship and round about the hull was a mass of fuel oil. A considerable number of holes were visible along her port side from the engine room to the after hatch, and some of the derricks were down and the port wing of the bridge was smashed. Williams examined the cargo to some extent and told Paterson that he thought he would be able to recover the guns. Paterson said to get on with the job as soon as possible. Williams also had some conversation with the master concerning the ship. He asked about the condition of the ship, and I have no doubt that the master said that he intended to go ashore and report to his owners that the ship was a constructive total loss. And I feel satisfied that Williams said he did not think she was and that he thought he could raise her. But the master persisted that his ship was finished and that Williams could not raise her. Williams returned to Darwin and saw Captain Thomas, the Naval Officer Commanding at the port, who promised him every assistance. On the following day Williams returned to the ship with Captain Low, who was in the employ of the plaintiff company, and also some naval ratings provided by Captain Thomas. Soundings were taken right along the ship to ascertain how she was lying, and it was noticed that the ship listed much more at low water than at high water. The most urgent matter was to get the guns and army

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vehicles from the "*Portmar*" for the use of the American Army and the defence of Darwin, but I have no doubt that Williams had also resolved to raise the ship. The problem presented no technical difficulties to so skilled a salvor as Williams, but there were some local conditions that created some practical difficulties.

(1) The tide in Darwin runs at about five knots and rises and falls about twenty-five feet. There was a danger that the tide might force the ship over. There was also a danger that storms, which come on very suddenly around
2063 Darwin, might force the ship across the bed she had made for herself and result in the breaking of her back.

(2) There was a grave risk of further aircraft attacks by the Japanese, and indeed the naval and military authorities feared that invasion was imminent. Consequently it was prudent and necessary that Williams' operations should be done at night time so that the Japanese might not see them.

(3) The fuel tanks were leaking: the ship was covered with fuel oil, every rope was slimy and round about the hull was a mass of fuel oil.

2064 (4) The ship had listed some nine or ten degrees. The most urgent problem according to Williams was to take out the cargo "forrard", for that would ease the ship.

So in the last week of February 1942 gear was rigged; some of it belonged to the company, of a value of about £600, and some was ship's gear. The American authorities provided Williams with some soldiers and the Naval authorities provided him with some naval officers and ratings. The Naval authorities also provided him with a naval vessel, the "*Gunbar*", which supplied power and also the use of her winch. A lighter also was supplied for landing the guns. The soldiers and naval ratings were not experienced stevedores, and Williams and Low, who were experienced in stevedoring, worked with and directed them.

By this means a number of army vehicles were recovered. Steps were also taken to plug the holes in the ship, and hooked plates were made for that purpose by arrangement with the naval authorities. A stern mooring was put down to hold the stern of the ship off a nearby reef. 2065

Soundings were taken and markings put down ashore. Early in March arrangements were made with the naval authorities to bring a steam tug called the *"Wato"* alongside with a 10 inch salvage pump to lower the water in the ship. She was made fast on the starboard quarter and started to lower the water, but the tide was falling rapidly and the pipe line had to be broken because the flexible portion of the pump was not long enough. There was no other pump in Darwin, so on 8th March 1942 Williams proceeded to Melbourne by air to obtain a suitable pump, which he succeeded in doing, and he also engaged a diver. He arrived back in Darwin on the 20th March and went straightway to the *"Portmar"*. The diver made a thorough under-water examination of the steel plating. 2066

All the heavy cargo was taken out. A platform was erected for the pump. On the 4th April the pump was started, the *"Gunbar"* being on the port quarter and the *"Wato"* on the starboard. The ship just lifted as the tide was almost at the top of the flood, so the *"Wato"* pushed her stern around onto a spit that was found when sounding and the ship was settled on the spit on an even keel. More patches were put on the hull. On the 5th April pumping was again started about two hours before low water. The ship floated, and she was hauled out by a ship provided by the naval authorities into the place marked off for her. The diver examined the ship's bottom, her engines were examined and also her plates. The salvage service claimed in these actions ended at this point, and the ship was handed over to the shipping control at Darwin, from whence she was towed to Brisbane and after some further repairs left for Sydney, and presumably came ultimately under the control again of the United States Maritime Commission. 2067

2068 *Underwriters' Exhibit 9.*

"A salvage service . . . may be described . . . as a service which saves or helps to save maritime—property—a vessel . . . when in danger; either at sea or on the shore of the sea, or in tidal waters, or on the shore of tidal waters, if and so far as the—rendering of such service is voluntary and attributable neither to legal obligation, nor to the interest of—self-preservation, nor to the stress of official duty" (Kennedy, The Law of Civil Salvage, 3rd. ed., p. 2). The services rendered to the *"Portmar"* were of this nature.

2069 It was argued for the owners of the ship that no salvage services were rendered to the ship because they were directed solely to the recovery of the guns etc. for the American Army and that the raising of the ship was incidental to that operation. Reference was made to the fact that a claim has been made against the American Army authorities for £2,500 for services rendered in salvaging United States Army property comprising guns, vehicles, petrol and equipment which includes several of the items of claim alleged to have been expended in the salvage services rendered in respect of the ship—*"Portmar"*. But the contention cannot be sustained so soon as the master of the ship stated that he proposed to advise his owners to abandon her as a constructive total loss I have no doubt

2070 that Williams resolved to—raise her. He did raise her without any legal obligation to do so. It was a skilful and very valuable service to a ship that, in my opinion, would otherwise have become a wreck and gone to pieces owing to the action of the rising and falling tide at Darwin and the sudden storms that arise in that neighbourhood. Apart from the naval authorities, who had much else to do, there was no one competent or available in Darwin to raise the ship, for all the inhabitants, including men brought by Williams from the south for raising a submarine, fled after the Japanese attack. It was a fortunate accident that so experienced, energetic and skilful a salvor as Williams was present in Darwin when the *"Portmar"* was beached.

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Next it was suggested that the services rendered by Williams were rendered in the performance of his public duties as the Chief Salvage Officer of the Salvage Board. It is enough at this point to say that Williams personally worked and laboured in and about the raising of the "*Portmar*" beyond the scope of the duties of that office or appointment. But I shall have to return to the work he actually performed and in what capacity that work was performed in connection with other aspects of this case, and say no more about it at present.

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It was also contended that the United Salvage Pty. Ltd. and the Salvage Board were incapable of claiming salvage awards because awards of this character were only decreed in favour of "those personally engaged in the service" (*The Charlotte*, 3 W. Rob. 68, at p. 72). But in these days it is recognised, if it were ever doubted, that salvage services may be rendered by corporations formed for that purpose (*The Glengyle*, (1898) P. 97; (1898) A. C. 519). And perhaps I had better here also mention "*The Chieftain*", 4 Notes of Cases 459.

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It is settled that in all salvage cases, whether the action be in rem or in personam, there must be some res saved (*The Cargo Ex Port Victor*), (1901) P. 243, at p. 255). In *The Chieftain*, (supra), which were proceedings in personam a monition (by which proceedings in personam were then commenced) was moved for against the owners of the salved ship calling upon them to show cause why an agreed salvage award should not be paid and the facts were that at some time after the salvage services had been rendered the ship was lost. Dr. Lushington said:—"There seems to me the greatest possible difficulty in acceding to this motion as the property is actually lost and gone and a monition to show cause is decreed only in cases where the property had been allowed to go into the hands of the owners instead of the parties attaching the property itself. . . . It would be to convert the jurisdiction of the Court from a proceeding in rem to a proceeding in personam which can only be

2074 *Underwriters' Exhibit 9.*

where the property is in possession of the proprietors themselves". This reason seems inconsistent with the reasoning in *"The Port Victor"* (supra). But even if the *"Portmar"* were lost by enemy action as was stated at the Bar, subsequently to her being raised at Darwin, still I should think, consistently with Dr. Lushington's observations that she had got into the owners' or charterers' hands after she was raised at Darwin and was lost whilst in their hands.

Another question arises between United Salvage Pty.
2075 Ltd. and the Salvage Board in respect of the services rendered by Williams. The United Salvage Pty. Ltd. claims that Williams in raising the *"Portmar"* was acting within the scope of his duties as its managing director and as its officer, whilst the Salvage Board claims that from the 20th March 1942 he was acting within the scope of his duties as its Chief Salvage Officer. National Security (Salvage Board) Regulations made on 4th March 1942 and notified in the Gazette on the 14th March 1942 provided that there should be a Board to be called the Salvage Board which should be a body corporate with perpetual succession and a common seal. The Board, it was also provided, should
2076 consist of three members, namely:—

(a) The Chairman of the Shipping Control Board (See National Security (Shipping Control) Regulations) who should be chairman and who was in fact, until the end of May 1942, Sir Owen Dixon, a Justice of this Court.

(b) The Chief Salvage Officer.

(c) A person appointed by the Minister on the recommendation of the Naval Board.

The Minister was also authorised to appoint a Chief Salvage Officer of the Board for the purposes of the regulations with such remuneration and on such terms and conditions as the Minister thought fit. The Chairman and one

other member formed a quorum. The Board might authorise the Chief Salvage Officer to direct, control, supervise or carry out all or any salvage operations. 2077

On the 27th March 1942 the Minister approved of a proposal of the Secretary of the Department of Commerce that he should ascertain what remuneration Williams obtained from certain commercial organizations of which the United Stevedoring Company was the principal and that Williams should be taken over by the Salvage Board as Chief Salvage Officer and paid a salary at least equal to that which he then received on the understanding that whilst employed on Salvage Board work he would not draw his fees or salary as managing director of the companies. 2078
On the 13th April 1942 the secretary suggested to the Minister that Williams should be paid a salary as Chief Salvage Officer and member of the Salvage Board £2,080 per annum and that he paid his own insurance premium. And the secretary on the same date also advised that the Minister for the Navy had nominated Lt. Commander Geoffrey Fleming Dixon R.N. as representative of the Navy on the Salvage Board and recommended to the Minister of Commerce that he appoint him accordingly. On the 14th April 1942 the Minister approved of the foregoing suggestion and recommendation. 2079

The first formal meeting of the Salvage Board was on 18th April 1942. Sir Owen Dixon severed his connection with the Board about 26th May to take up another public appointment as Minister Plenipotentiary at Washington. And on 4th June 1942 the Minister announced for general information that the following persons had been appointed to be members of the Salvage Board constituted under the National Security (Salvage Board) Regulations:

Chairman of Shipping Control Board, His Honour Judge Thomas Stuart Clyne.

Chief Salvage Officer, John Protheroe Williams.

Nominee of Naval Board, Lt. Commander Geoffrey Fleming Dixon R. N.

2080 *Underwriters' Exhibit 9.*

The Salvage Board has not, I think, established that Williams in raising the *"Portmar"* was acting as its Chief Salvage Officer or that he was acting within the scope of his duties as such officer. Williams and Lt. Commander Dixon were not appointed as members of the Salvage Board before 14th April 1942 or perhaps before 18 April when the Board held its first formal meeting. The salvage services in respect of the ship *"Portmar"* were completed, it should be remembered, on the 5th April 1942 or at latest on the 6th April when Williams left for Melbourne, where he arrived
2081 by air on the 9th April 1942. And it is to be noticed that on the 30th March when it was feared that the pumps which Williams had procured in Melbourne had not arrived in Darwin, it was to his Company, the United Stevedoring Company, that - - - Williams notified the fact and stated they were urgently required. And it is also to be noticed that it was not until the 11th May 1942 that the United Salvage Pty. Ltd. granted Williams leave of absence from his employment in that company whilst engaged on duties with the Salvage Board. All the negotiations initiated by Sir Owen Dixon for Williams' services were tentative and in anticipation of the Minister appointing Williams and Lt. Commander Dixon to the Salvage Board. But the Salvage
2082 Board incurred no legal responsibility until Williams and Lt. Commander Dixon were formally appointed. And I think the Chairman was careful to avoid any such responsibility for the Board until it was fully constituted. Thus there is a minute of what is called a preliminary meeting of the Salvage Board which sets forth that Sir Owen Dixon advised that until the members of the Board had been gazetted it was not possible to set up the organization of the Salvage Board but that meanwhile many matters dealing with the physical requirements of the Salvage Board could be put in hand. And indeed Sir Owen did not think the Salvage Board was in a position to give Williams a letter as from the Salvage Board when he returned to Darwin to raise the *"Portmar"* requesting that all assistance be given to him.

But it was said for the Salvage Board that it was in existence from the 14th March 1942 (Acts Interpretation Act 1901-1937, S. 48) although unable to function as a corporate body until its Chief Salvage Officer and Naval representative were appointed about the 14th April 1942. And further that on their appointment the acts and doings of Williams in connection with the raising of the *"Portmar"* from the 20th March 1942 when he first met Sir Owen Dixon were approved and ratified as acts and doings of the Board or as done on its behalf. It is true that Williams, after he was appointed, was paid salary as from the 27th March 2084
1942 but there are liabilities amounting to about £1,000 connected with the raising of the *"Portmar"* that the United Salvage Pty. Ltd. paid, for instance, hire of pumps to 6th April £281—the day after the *"Portmar"* was raised—rail and air fares and insurance for Williams and others in connection with the visit to Melbourne to procure pumps and return to Darwin, and wages. I have not overlooked the fact that United Salvage Pty. Ltd. has charged some, if not all, of these items against American Army authorities. But the point is that the Salvage Board never concerned itself with these obligations even though a proportion of the sum might properly be chargeable to the raising of the *"Portmar"*. 2085
And there are various records relied upon by the Salvage Board the purport of which is that the Board and Williams recognized that he was the Board's officer from about the 20th March 1942 when he first met Sir Owen Dixon, as already mentioned. According to *Kelner* v. *Baxter*, L. R. 2 C. P. 174, ratification can only be by a person or a body ascertained at the time the act was done—by a person or body in existence either actually or in contemplation of law. The case of *Sutton's Hospital*, 10 Coke Rep. 1(a), 23(a); 77 E. R. 937, 960, it is said, suggests that the Salvage Board was a corporation in abstracto if not in concreto from the 14th March 1942 when the Salvage Board Regulations were gazetted. The fact in that case, however, was that named persons and their successors were incor-

porated (*Sutton's Hospital, (supra)* at pp. 9, 10(a), 26(a)). But apart from this technical answer to the contention of the Salvage Board, Williams, it appears to me, was more concerned with raising the "*Portmar*" than with the body for whom he was conducting the operations or acting or purporting to act. Thus in April 1942 he was discussing with Lt. Commander Dixon and the secretary of United Salvage Pty. Ltd. the financial aspects of the salvage operations at Darwin and how to divide and treat financially those operations, and in June 1942 he was engaged in much
2087 the same sort of discussions with various interested parties. And Williams, I think, always had in mind that "it was permissible for the person who actually performed the work" to claim salvage reward (See Salvage Board's Minute, 10th August 1942). Further, Williams did not, I feel sure, intend to oust the claims of United Salvage Pty. Ltd. as salvors of the "*Portmar*". And I am not prepared to find that Williams by his actions dispossessed or intended to dispossess or could dispossess the United Salvage Pty. Ltd. without its knowledge and assent from whatever right it had as salvors in possession of the "*Portmar*" by reason of the operations of its managing director and officer (See Kennedy, Law of Civil Salvage, 3rd ed., p. 213). I would
2088 add that even if the operations of Williams on the "*Portmar*" from 14th March 1942 onward were to be regarded as operations conducted on behalf of the Board, I should not be prepared to make any salvage award in favour of the Board. Williams was appointed by the Minister as Chief Salvage Officer but the Board did nothing and risked nothing in the raising of the "*Portmar*", apart from the salary the Board paid to Williams from the 27th March 1942 and the obligations it incurred under an agreement made with the Marine Underwriters & Salvage Association of Victoria Ltd. dated 17th March 1942, but signed, I think, about 15th May 1942. And it is to be noticed that the United Salvage Pty. Ltd. paid for the hire of the pumps £281.17.2 until 6th April 1942 and that the pumps were used and

ultimately acquired by the Salvage Board after that date in connection with the "*Portmar*" and her towage to Brisbane and other purposes. Williams, I must add, even if he were the Chief Executive Officer of the Board at any relevant time, nevertheless, worked and laboured far beyond the scope of any duty as Chief Salvage Officer: he worked in danger of bombing and invasion: he helped to rig and work gear: he worked amidst the fuel oil and directed and helped the workmen in repairing the ship: he made soundings and laid down markings and slept anywhere he could. The operations were peculiarly a personal 2090
effort on the part of Williams.

The claim of United Salvage Pty. Ltd. and Williams for a salvage reward remains for consideration. The services rendered were, and I have said, salvage services. The United Salvage Pty. Ltd. and Williams do not seek for the distribution of the salvage award between them but desire that their claim shall be dealt with without any separation of interests. There is no absolute rule or fixed scale of remuneration. "It is not a mere question of work and labour, not a mere calculation of hours, though time is undoubtedly an ingredient; but there are various facts for consideration—the state of the weather, the degree of 2091
damage and danger as to ship and cargo, the risk and peril of the salvers, the time employed, the value of the property, and when all these are considered, there is still another principle—to encourage enterprise, reward exertion, and to be liberal in all that is due to the general interests of commerce, and the general benefit of owners and underwriters, even though the reward may fall upon an individual owner with some severity" (The Industry, 3 Hagg. 203, at p. 204). The nature of the service has already been described, and the value of the ship, and the danger to which it was exposed, and the time employed have been stated. The value of the property risked by the salvors in the service was not large, gear worth £600 or so and pumps hired from the Underwriters Association valued at about £1,700

2092 *Underwriters' Exhibit 9.*

which were taken over ultimately by the Salvage Board. The Naval authorities, it will be remembered, gave great assistance and provided plant and material and ratings in order to effect the salvage services. But I have been informed that the Naval authorities make no claim, and that the officers and ratings who rendered personal services in connection with the raising of the "*Portmar*" have dispersed, and records of their services are not available. The expenses incurred in the performance of the salvage services (which are also a matter to be considered) are set
2093 forth in the particulars under paragraph 11 of the statement of claim at £1,045 but some of these items have also been claimed against the American Army authorities and will probably be paid by them. But I have not overlooked the possibility of non-payment nor the expenses that have not been claimed against the Army. And I think I may legitimately refer to the fact that a claim for £2,500 is made against the American Army authorities for recovery of the guns etc. estimated to be of a value of not less than £100,000 in Australian currency (See Exhibit 4). The recovery of the guns etc. was not, it must be observed, a salvage service but services rendered upon request for
2094 which I should think reasonable remuneration would be payable in any event. The services rendered to the ship were true salvage services, independent of contract and dependent in respect of remuneration upon their success. They were skilful and energetic, rendered in somewhat difficult and uncomfortable conditions and in circumstances of considerable danger.

I have looked at the amounts of awards made in many cases in England, but, as might have been expected, they range from many thousands to a few hundreds of pounds according to the circumstances of each particular case. And in this case, having regard to all its circumstances, I award the sum of £5,000 to the plaintiffs, the United Salvage Pty. Ltd. and Captain Williams, in respect of the services rendered by them in the salvage of the ship

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"Portmar". And these plaintiffs must also have their costs of action including the costs of the shorthand notes. The claim of the Salvage Board is dismissed and the Board must pay the costs of its action against Calmar Steamship Corporation which are exclusively attributable to that action.

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2098 **Opinion of Ryan, D. J., with Findings of Fact and Conclusions of Law.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION, a Delaware Corporation,
Libelant,
against
2099 UNITED STATES OF AMERICA,
Respondent. Ad. 129-295

CALMAR STEAMSHIP CORPORATION, a Delaware Corporation,
Libelant,
against
SYDNEY KEITH SCOTT, one of the LLOYD'S UNDERWRITERS, EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents. Ad. 133-332
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Appearances:

KIRLIN, CAMPBELL & KEATING, Esqs., Proctors for libelant; EDWIN S. MURPHY, IRA A. CAMPBELL and HELEN C. CUNNINGHAM, Esqs., of Counsel.

IRVING H. SAYPOL, Esq., U. S. Attorney, Proctor for respondent—United States; EDWARD L. SMITH and JOHN A. MONTGOMERY, JR., Esqs., of Counsel.

MENDES & MOUNT, Esqs., Proctors for respondents Scott, etc.; RUSSELL T. MOUNT and WALTER B. HALL, Esqs., of Counsel.

—all of New York City.

RYAN, J.

These two suits brought in the admiralty by Calmar Steamship Corporation, as owner of the SS. *Portmar*,

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arise out of the voyage of that vessel from San Francisco which began on November 28, 1941. On that voyage she was damaged by Japanese air attacks while in the Timor Sea on February 15 and 16, 1942, and in the harbor of Port Darwin, Australia, on February 19, 1942, she was subsequently beached after these attacks near Darwin.

The suits were tried together and the findings of fact hereinafter made and the conclusions of law reached are to be applied to both suits.

The first libel (Ad. 129-295) was filed on February 11, 1944 by "Calmar" against The United States of America. The libel as filed named a number of individual respondents; as to them it has been discontinued and now proceeds only against the United States. The suit asserts claims upon a time charter party for damage to the *Portmar* from Japanese bombing and strafing on February 15, 16 and 19, 1942 and charter hire from March 1, 1942 (later amended to February 19) to November 17, 1942.

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The United States asserts, by answer, that this court has no jurisdiction over the suit against it and, in addition, denies any liability on its part. It pleads in support of the objection to jurisdiction that the suit is not within the permission to sue contained in the Suits in Admiralty Act (Secs. 1 and 2, 46 U. S. C. A. 742), due to the fact that the *Portmar* was not a merchant vessel operated by or for the United States and because the claims asserted are not cognizable under the Public Vessels Act (Sec. 1, 46 U. S. C. A. 781), or other governmental consent to be sued in the district court. Liability is disclaimed for the damages sustained by the *Portmar* as a result of enemy action because such losses are either within the coverage of the war risk insurance taken out pursuant to the provisions of the charter, or are excluded from coverage by reason of risks assumed by the owner or its failure to take out adequate insurance. Liability is denied for charter hire in addition to that paid because the obligation to pay hire terminated

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2104 *Opinion of Ryan, D. J., with Findings of Fact and Conclusions of Law.*

by express provision of the charter by reason of the *Portmar's* becoming a constructive total loss on that date, or in the alternative because the owner's election to treat her as such terminated the obligation to pay hire.

"Calmar" filed the second libel (Ad. 133-332) on November 15, 1944 against the war risk underwriters of the *Portmar*, who have rejected liability for the losses sustained on this eventful part of the voyage of the *Portmar*. The suit is based on three policies of war risk insurance (all to the
2105 same effect and of the same tenor, except as to amount), totalling $860,000. The libel pleads claims totalling $902,761.12 with interest, of which $860,000 is sought to be recovered for a constructive total loss of the vessel, and $42,761.12 with interest for certain "sue and labor" expenses. The libel asks that if it be held that the damage did not amount to a constructive total loss under the policies in suit, then that for a partial loss there be awarded the sum of $250,000 with interest.

The underwriters deny liability upon the ground that the vessel was not covered by the war risk insurance policies issued by them at the time the *Portmar* sustained the dam-
2106 age, because (a) she had been insured as a commercial and cargo vessel for trading and when damaged she was a ship of war and part of an invasion expedition, (b) that the voyage covered had terminated prior to the bombing, straf-ing and beaching of the vessel, (c) that she had been intentionally exposed as a warship to enemy attack, (d) that the "capture, seizure, arrest, restraint, detainment, etc." rider of the policies did not cover the damage sustained, (e) that if it be determined that the insurance had not terminated at the time of the damage, the "held-covered" clause of the policies applied and the additional premiums thus due amount to not less than 75% of the insured value of the vessel, which should be set off against any recovery allowed, (f) that there was not a constructive total loss and that the tender of abandonment to the underwriters was

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ineffectual, and finally (g) that in view of the provisions of the charter party, there was at no time any capture, seizure, arrest, restraint or detainment of the *Portmar*.

The libel against the United States is largely alternative to the result of the suit against the underwriters. In January, 1948, "Calmar" also filed suit against the United States in the Court of Claims (No. 48509), seeking to recover for substantially the same claims as those pleaded in the first libel herein. This suit is pending and undetermined.

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With the issues thus framed, the suits herein proceeded to trial. After consideration of the testimony and exhibits, I make the following:

Findings of Fact.

(1) Calmar Steamship Corporation is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business at 25 Broadway, County, City and State of New York.

(2) Calmar Steamship Corporation was the owner of the SS. *Portmar* during the period beginning November 21, 1941 and ending at noon, Eastern Australian Time, November 17, 1942.

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(3) The SS. *Portmar* was a single screw ocean cargo steamship registered under the laws of the United States, built in 1919, classified and maintained in Class A-1, Lloyd's Register of Shipping. Her tonnage was gross 5,500, net 3,418, deadweight capacity 8,600 tons. Her dimensions were length 409.8′; beam 54.2′; depth 27.7′. Her speed on a consumption of 164 barrels of fuel oil per day was in excess of 9½ knots.

(4) As of November 21, 1941 Calmar Steamship Corporation chartered the SS. *Portmar* to the United States acting, pursuant to statutory authorities, by and through

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the United States Maritime Commission by a voyage charter on a time basis, which contained among others, the following provisions:

"PART I.

"ARTICLE 1.01. The Owner agrees to let, and the Charterer agrees to hire the Vessel, from time of delivery, for trading for one round voyage from United States Pacific port or ports to a port or ports in the
2111 Philippine Islands, returning to U. S. North Atlantic port or ports."

"ARTICLE 1.02. The rate of hire payable as provided in ARTICLE 2.03 shall be $4.70 per ton of the Vessel's deadweight capacity as hereinbefore stated per month or pro rata for any portion thereof. The Charterer shall also pay the Owner at the rate of $1.50 per day per person for victualling of any personnel (in addition to the Vessel's normal complement) required to be aboard the vessel by written request of the Charterer or by any other agency or department of the Government, * * *"

2112 "ARTICLE 1.03. The valuation of the Vessel for insurance purposes as provided in ARTICLE 2.17 shall be $860,000."

"ARTICLE 1.04. The Vessel shall be delivered at the port of Portland, Oregon on or about November 21, 1941, and redelivered (unless lost) at a U. S. North Atlantic port, north of Cape Hatteras. * * *"

PART II.

"ARTICLE 2.01. * * * The Vessel on her delivery shall be ready to receive cargo with clean-swept holds and, as far as due diligence can make it so, tight, staunch, strong and in every way fitted for service, hav-

ing water ballast, winches and power sufficient to run all the winches at one and the same time and a Master and a full complement of officers and a crew for a vessel of her tonnage, and due diligence shall be exercised by the Owner to maintain her in such state during the currency of this Charter. * * *"

"ARTICLE 2.03. The Charterer shall (except as otherwise specifically provided herein) pay hire for the use of the Vessel at the rate stipulated in ARTICLE 1.02, beginning with the time of her delivery, and continuing until the time of her redelivery in like good order and condition, ordinary wear and tear excepted, to the owner at the port of redelivery specified in ARTICLE 1.04, or if the Vessel shall be lost, until the time of her loss, if known, otherwise to the time last heard from; or in the case of a constructive total loss, to the time of the casualty resulting in such constructive total loss, except that where two or more successive casualties contribute to such loss, the time of the casualty last occurring shall be the time when hire ceases. Redelivery shall not be made until completion of repairs of any damage arising from causes specified in ARTICLE 2.04 (ii), and hire shall continue until completion of such repairs, except to the extent that loss of time is caused by failure of the Owner to exercise due diligence to have such repairs effected promptly and to prevent loss of time. The hire provided for in this Charter shall be due and payable on the first day of each calendar month for the preceding month or portion thereof. * * *"

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"ARTICLE 2.04. Payment of hire hereunder shall cease to the extent that time is lost to the Charterer:

(a) if the Vessel is prevented, in whole or in part, from working for twenty-four consecutive hours because of a deficiency of men or stores, breakdown

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of machinery, collision, stranding, or fire or other accident or damage to the Vessel; * * *"

* * * * * *

"*Provided*, however That, except to the extent that loss of time is caused by the failure of the Owner to exercise due diligence to keep the Vessel working and to prevent loss of time, payment of hire shall not cease because of:

* * * * * *

2117 "(ii) the happening of any event listed in (a) above caused by the fault of the Charterer or caused or contributed to by war or warlike acts, sailing in convoy, operating (contrary to peace-time custom) without lights or pilots, navigating or mooring in (contrary to peace-time custom) unlighted, unbuoyed, or overcrowded waters, excessive usage (because of war or warlike conditions) of machinery or equipment, navigating (contrary to peace-time custom) under the direction of naval, military, Coast Guard, or other governmental authorities, or discharging alongside or into ships; * * *"

2118 "Credit shall be given to the Charterer for expenses save by the Owner during any loss of time as to which no cessation of hire is provided for."

* * * * * *

"ARTICLE 2.05. The Owner shall provide and pay for: all provisions; all galley, cabin, deck and engine room stores; fuel for cooking; wages of, and consular, shipping and discharging fees and other expenses pertaining to, the Master, Officers and Crew (xcept as herein otherwise provided); 25% of all fresh water used by the Vessel if a steamer, or 75% if a motorship, all water ballast; and insurance (except as herein otherwise provided) on the Vessel."

"ARTICLE 2.11. * * * The Master (although appointed by the Owner) shall be under the orders and directions of the Charterer as regards employment, agency, and prosecution of the voyages; * * *"

"The charterer shall indemnify and hold harmless the Owner, the Master and the Vessel from all consequences and liabilities whatsoever arising from compliance with any orders or directions of the Charterer or its agents, given pursuant to this Article or any other Article of this Charter."

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"ARTICLE 2.16. * * * And neither the Vessel, her Master or Owner, nor the Charterer, shall, unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from: act of God, act of war; act of public enemies, pirates, or assailing thieves; arrest or restraint of princes, * * *. No exemption afforded to the Charterer under this Article shall diminish its obligations for hire under the other provisions of this Charter."

"ARTICLE 2.17. The Owner may provide, and the Charterer shall pay for, or, if the Charterer shall so 2121 elect and give notice of such election to the Owner at or prior to the date of delivery of the Vessel with respect to the first voyage, or at or prior to the time when loading commences at the first port of loading with respect to any subsequent voyage during the charter period, the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, which shall be made payable to the owner, in the amount specified in Article 1.03, under full form of American Institute of Marine Underwriters' war risk policies, including malicious damage, sabotage, strikes, riots, and civil commotion valued at the amount insured: (ii) all war risk insurance, as required, on the lives of or for injuries to officers and crew and loss of or damage to

2122 their personal effects, including sextants of deck officers, or leased equipment aboard for which the Owner is responsible, and on slop chests; and (iii) war risk protection and indemnity insurance, for the benefit of the Owner and the Charterer as their interests may appear, including Owner's liabilities to officers and crew until repatriated."

"The Vessel shall not be required to sail on any voyage until the insurance contemplated by this Article 2123 has been placed by the Owner or provided or assumed by the Charterer, as the case may be, provided, however, that written or telegraphic notice of assumption by the Charterer shall be sufficient."

* * * * * * *

"ARTICLE 2.21. Nothing herein stated is to be construed as a demise of the Vessel to the Charterer."

* * * * * * *

"ARTICLE 2.27. The Master and the Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, 2124 stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions anything is done or is not done, such shall not be deemed a deviation or breach of orders or neglect of duty by the Master or the Vessel; *provided, however*, that whenever any such orders or directions given otherwise than by the Government of the United States or its representative are contrary to sailing directions or other orders of the Charterer as to the employment of the Vessel hereunder, the Master shall, if practicable,

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apply to the Charterer or its agents or to a representative of the Government of the United States for consent or advice and shall not comply with such orders or directions unless such consent or advice to comply is first obtained; provided further, however, that if it is impracticable in any case to act in accordance with the foregoing proviso, the Master's decision as to compliance with any such orders or directions shall be made with due regard to the interests of all concerned, including the Charterer, the Owner, the Vessel, her crew and cargo."

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(5) Pursuant to the provisions of Article 2.17 of said Charter, Calmar Steamship Corporation took out war risk insurance under full form of American Institute of Marine Underwriters' war risk policies, including malicious damage, sabotage, strikes, riots and civil commotion, on the hull and machinery of SS. *Portmar* valued at $860,000. Said insurance was arranged through its brokers, Mather and Company, Philadelphia, and their London correspondent, Thomas Stephens & Sons, Ltd.

(6) Slips binding said war risk insurance were submitted to the various underwriters representing members of syndicates of Lloyds, London, and to members of the Institute of London Underwriters, and to the Excess Insurance Company, Ltd., all of whom initialed the slips with notation as to amounts of portions of the risk subscribed.

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(7) Said slips contained among others the following provisions:

"U. S. Dollar A/C
"Portmar" /S/

U. S. Pacific to at and from Philippines and return to U. S. Pacific &/or Atlantic port or ports and 15 days
via port or ports in any order
HULL & MACHINERY valued $860,000.

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"Against war, s.r. & c.c. and m.d. American Clauses N. Y. S. Cl. Undrs. pay tax."

Said slips were initialed by said underwriters on November 26 and 27, 1941.

(8) Prior to November 26, 1941, negotiations between the Secretary of State, Hon. Cordell Hull, and Japanese envoys, Admiral Kichisaburo Nomura, and Mr. Saburo Kurusu, approached a critical stage. The daily press car-
2129 ried news items of increasing tension in the Pacific situation. The possibility of war with Japan was openly recognized and provoked much discussion in American and British official circles. The British Prime Minister had discussed the extent of British naval participation in the Pacific in the event of war with Japan. It was generally expected that danger might develop at any moment in the Far East.

(9) Mather & Company sent to Thomas Stephens & Sons, Ltd. printed forms of marine hull insurance in the form "American Institute Time (Hulls) (July 1, 1941)" and War Risk Clauses and riders to be attached thereto
2130 in the form published by the American Institute of Marine Underwriters, after adoption and promulgation by the American Marine Insurance Syndicate.

(10) On January 19, 1942, Sydney Keith Scott and other underwriting members of Lloyds, London, respondents herein, issued a policy of war risk insurance on said forms, insuring Calmar Steamship Corporation in the total sum of $714,000 on the hull and machinery of SS. *Portmar* valued at $860,000, at and from a United States Pacific port to port or ports in the Philippine Islands whilst there and return to United States Pacific port or United States Atlantic port (via Panama Canal) via port or ports any order and for twenty-four hours after arrival.

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(11) On January 19, 1942 Edinburgh Assurance Co., Ltd., Northern Maritime Insurance Co., Ltd., Fine Art & General Insurance Co., Ltd., British Law Insurance Co., Ltd., Planet Insurance Co., Ltd., Elders Insurance Co., Ltd., and National Provincial Insurance Co., Ltd., as members of the Institute of London Underwriters issued a policy of war risk insurance on said forms, insuring Calmar Steamship Corporation in the total sum of $116,000 on war risk insurance on the hull and machinery of SS. *Portmar* valued at $860,000 at and from a United States Pacific port to port 2132
or ports in the Philippine Islands whilst there and return to United States Pacific port or United States Atlantic port (via Panama Canal) via port or ports any order and for twenty-four hours after arrival.

(12) On January 19, 1942, Excess Insurance Company, Ltd., issued a policy of war risk insurance on said forms insuring Calmar Steamship Corporation in the sum of $30,000 on the hull and machinery of SS. *Portmar* valued at $860,000, at and from a United States Pacific port to port or ports in the Philippine Islands whilst there and return to United States Pacific port or United States Atlantic port (via Panama Canal) via port or ports in any 2133
order and for twenty-four hours after arrival.

(13) Libelant duly paid to respondents the issuing premiums required by said policies.

(14) The said policies contained among others the following provisions:

> "Only against the risks of war, strikes, riots and civil commotions as per American form attached."
>
> "Touching the Adventures and Perils which we, the said Underwriters, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, . . . and of all other like Perils, Losses and Misfortunes that have or shall come to the

Hurt, Detriment or Damage of the said Vessel, &c., or any part thereof; excepting, however, such of the foregoing Perils as may be excluded by provisions elsewhere in the Policy or by endorsement. And in case of any loss or Misfortune it shall be lawful for the Assured, their Factors, Servants and Assigns to sue, labor and travel for, in, and about the Defense, Safeguard and Recovery of said Vessel, &c., or any part thereof, without prejudice to this Insurance, to the Charges, whereof the Underwriters will contribute their proportion as provided below. And it is expressly declared and agreed that no acts of the Underwriters or Assureds, in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment."

. . . . . .

"Notwithstanding anything herein contained to the contrary, this Policy is warranted free from Particular Average under 3 percent., or unless amounting to $4,850, but nevertheless when the Vessel shall have been stranded, sunk, on fire, or in collision with any other ship or Vessel, Underwriters shall pay the damage occasioned thereby, and the expense of sighting the bottom after stranding shall be paid, if reasonably incurred, even if no damage be found."

. . . . . .

"No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value.

"In ascertaining whether the Vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the

damaged break-up value of the Vessel or wreck shall be taken into account."

* * * * * * *

"F. C. & S. Clause.

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or 2138
of any attempt thereat, or any taking of the Vessel by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or war-like operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

"If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."

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War Risk Clauses.

"It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.

"This insurance is also subject, however, to the following warranties and additional clauses:

The Adventures and Perils Clause shall be construed as including the risks of piracy, civil war, revolution, rebellion or insurrections or civil strife

2140 arising therefrom, floating and/or stationary mines and/or torpedoes whether derelict or not and/or military or naval aircraft and/or other engines of war including missiles from the land, and warlike operations and the enforcement of sanctions by members of the League of Nations, whether before or after declaration of war and whether by a belligerent or otherwise, but excluding arrest, restraint or detainment under customs or quarantine regulations, and similar arrests, restraints or detainments 2141 not arising from actual or impending hostilities or sanctions.

The Franchise warranty in the attached policy is waived and average shall be payable irrespective of percentage and without deduction of new for old. The provisions of the attached policy with respect to constructive total loss shall apply only to claims arising from physical damage to the insured vessel."

* * * * * * *

"Held covered in the event of any breach of warranty as to date of sailing or deviation or change 2142 of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required." F-300

"Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in cooperation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise

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covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure, or Detention. B. C. 2."

(15) Calmar Steamship Corporation by letter of November 26, 1941, informed the United States Maritime Commission of the kind and amount of insurance that it had taken out for this voyage. 2144

(16) The said policies of insurance were approved by the United States Maritime Commission, and were in accordance with Article 2.17 of said charter.

(17) During the period beginning November 21, 1941 and ending November 17, 1942, the Master of the *Portmar* was Axel Michelson, a duly licensed and competent master mariner, employed by Calmar Steamship Corporation, and who had been in the employ of Calmar since 1927.

(18) Pursuant to said charter, on November 23, 1941, high octane gasoline in drums was loaded on the *Portmar* at Oakland, California, and military equipment, supplies and ammunition were subsequently loaded at San Francisco, California. 2145

(19) Prior to sailing on the voyage the Master received secret written and oral orders from the U. S. Naval Control officer in San Francisco, 12th Naval District, imposing radio silence shortly after leaving San Francisco, and stating the following successive positions to be passed through by the *Portmar* on the outward voyage from San Francisco to Manila, Philippine Islands: (1) Lat. 37° 45′ N; Long. 122° 41′ W; (2) Lat. 32° 30′ N; Long. 129° 30′ W; (3) Lat. 22° 50′ N; Long. 140° 00′ W; (4) Lat. 13° 50′ N; Long. 149° 40′

W.; (5) Lat. 3° 45′ N; Long. 160° 00′ W; (6) Lat. 6° 00′ S; Long. 170° 45′ W; (7) Lat. 11° 50′ S; Long. 180° 00′; (8) Lat. 12° 50′ S; Long. 166° 30′ E; (9) Lat. 15° 25′ S; Long. 157° 30′ E; (10) Lat. 12° 10′ S; Long. 148° 10′ E; (11) Lat. 5° 35′ S; Long. 130° 00′ E; (12) Lat. 6° 00′ N; Long. 123° 05′ E, to destination.

(20) The routing orders thus given the *Portmar* were given by the United States as sovereign and not as charterer, and were such as were customarily issued during this
2147 period to those in charge of American flag, cargo vessels regardless of ownership or charter arrangements. The prescribed course did not follow the usual and customary commercial lanes travelled in normal times between San Francisco and the Philippines.

(21) The Master did not inform Calmar Steamship Corporation of the points stated in the said Naval Orders, and Calmar did not know the route thus prescribed.

(22) On November 28, 1941, the *Portmar*, fully manned, equipped, supplied and seaworthy in all respects, sailed from San Francisco pursuant to said charter and followed
2148 the course prescribed in the Naval Orders.

(23) At the time the *Portmar* sailed there were three U. S. Army Sergeants on board as supercargoes, one of whom had a complete manifest of all cargo on board.

(24) On December 7, 1941, the Japanese attacked Pearl Harbor.

(25) On December 7, 1941, at about 8 a. m. the Master of the *Portmar* heard a radio report of the Japanese attack on Pearl Harbor. The *Portmar* was then at about Lat. 15° 0′ N; Long. 149° 0′ W, about 600 miles south east of the Hawaiian Islands.

(26) The U. S. Naval routing orders required the *Portmar* to pass between or near Fanning and Christmas

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Islands. The Master knew of cable landings on those islands, and feared that he could not pass said islands by night or day without being observed, attacked and possibly captured by the Japanese. Properly, for the safety of his vessel, he put the *Portmar* on a southerly course to avoid all the islands until further naval orders were received.

(27) On December 8, 1941, the United States and Great Britain declared war against the Japanese Empire.

(28) On December 9, 1941 HMS *Prince of Wales* and HMS *Repulse* were destroyed by Japanese aircraft off the east coast of the Malay Peninsula. The loss of these two ships together with United States losses at Pearl Harbor gave the Japanese full battle fleet command of the Pacific. The Japanese then had naval superiority which enabled them to transport troops to almost any desired point, possess themselves of it, and establish it for an air-naval fueling base.

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(29) On December 11, 1941, when the *Portmar* was at about Lat. 2° 0′ S, Long. 148° 0′ W, the Master received an order by radio from the Commandant of the 12th U. S. Naval District, San Francisco, ordering the *Portmar* and three other vessels to proceed to Suva, Fiji Islands, and there receive further instructions from the British Naval Authorities. The *Portmar* in compliance changed course toward Suva.

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(30) The *Portmar* arrived at Suva on December 20, 1941, and a British Naval Control Officer, Commander Gray, accompanied by a United States naval officer, also named Commander Gray, came on board the vessel. British Commander Gray gave the Master written and oral orders to proceed to Sydney, Australia. In answer to the Master's questions as to taking orders from the British Naval Control officer, Commander Gray, U. S. N., told him that it was

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with the absolute knowledge and understanding of the United States authorities and that he should comply.

(31) At Suva, Captain Michelson tried to send a cable message to Calmar Steamship Corporation but was informed that it could not be done for security reasons. He thereupon wrote two letters to Calmar Steamship Corporation, in one of which he informed them of the foregoing events, and left the letters with one of said naval officers to be mailed.

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(32) Calmar Steamship Corporation never received these letters written by the Master at Suva.

(33) From the time the *Portmar* left Suva for Sydney, Australia, until the damage later sustained by enemy attack on February 19, 1942, every movement of the *Portmar* was directed by and in accordance with orders of the military authorities, either of the United States or of the Australian Government. All of these orders were given by these allied governments as sovereigns engaged in war and for military reasons, as well as to provide for the greater safety of the vessel.

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(34) The *Portmar* sailed from Suva on December 22, 1941, and arrived at Sydney, Australia, on December 30, 1941. Captain Michelson there reported to the Australian Naval Control officer.

(35) The Master, through his agents at Sydney, Australia, Dalgety & Company, and the United States Consul, tried to send a cable message to Calmar Steamship Corporation, but was told that it could not be done for security reasons.

(36) At Sydney, the Master received written and oral orders from the Australian Naval Control officer requiring the *Portmar* to proceed to Brisbane, Australia and there report to the Australian Naval Control officer.

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(37) At Sydney, the Master inquired of the United States Consul whether it was with their knowledge and approval that he should take orders from the Australian Naval Control and was told by the consul that he was obliged to follow such orders.

(38) The *Portmar* sailed from Sydney on January 2, 1942 and arrived at Brisbane on January 5, 1942. The Master reported to the Australian Naval Control officer at Brisbane.

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(39) The Master attempted through his agents, at Brisbane, Dalgety & Company, and through the United States consul there to send a cable message to his owners, but was informed it could not be done.

(40) In response to the Master's inquiry, the American consul at Brisbane told him that he should continue to follow the orders of the Australian military authorities, as it was with the full knowledge of the American authorities.

(41) The United States military authorities at Brisbane gave orders that the cargo on the *Portmar* was to be discharged, sorted and part of it reloaded, together with other cargo, and employed Australian stevedores to do this work. The Australian Naval Control officer at Brisbane thereupon ordered the *Portmar* to proceed to Port Darwin. Pursuant to these orders, the *Portmar* sailed from Brisbane on January 9, 1942.

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(42) While proceeding to Port Darwin according to orders, on January 15, 1942, the Master was ordered by signal to go into the harbor at Thursday Island, Torres Strait. The Australian Naval Control officer there ordered the *Portmar* to proceed to Darwin with two other American ships in convoy of two Australian corvettes. The *Portmar* arrived at Port Darwin on January 19, 1942.

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(43) From the time the vessel sailed from San Francisco until January 19, 1942, Calmar Steamship Corporation had not received any information as to the *Portmar*.

(44) On January 19, 1942, Calmar Steamship Corporation received unofficial information from Mr. Freeze of the United States Lines, who stated that the United States Lines was to be the homeward agent on the charter and that the *Portmar* was somewhere in Australia.

2159 (45) On January 22, 1942, Calmar Steamship Corporation received a teletype message from its San Francisco office stating that the *Portmar* was in Australia. On January 24, 1942, Calmar Steamship Corporation assuming that the *Portmar* had gone to Australia under government orders, notified the war risk underwriters that the *Portmar* had been diverted to Australia on outward voyage under Government orders and requested that the vessel be held covered pending further advices. All the underwriters agreed, and this was confirmed by letter from Thomas Stephens & Sons, Ltd., of February 6, 1942 to Mather & Company, reading: "We have your cable of the 24th January last advising that this vessel insured for the voyages
2160 from U. S. Pacific ports to the Philippines and return to U. S. has been diverted to Australia on the outward voyage under Government orders. We confirm that all Underwriters on our War Risk Policy have agreed to hold this diversion covered pending your further advices."

(46) On January 19, 1942, the Master reported to the Australian Naval Control officer at Port Darwin. The United States Army authorities at Port Darwin ordered the Master to discharge the cargo from the *Portmar* as soon as a berth was available. The *Portmar* lay at anchor in Darwin Harbor until she docked at Port Darwin on January 31, 1942. The cargo was discharged, except 1500 drums of gasoline which the American military authorities ordered

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the Master to retain on board. The *Portmar* was thereupon ordered to reload 500 drums of gasoline, previously discharged, to make the amount on board 2,000 drums.

(47) The Master again attempted to send a cable message to Calmar Steamship Corporation, but was told that it was absolutely impossible, that the land lines from Darwin to Melbourne were inadequate to carry half the necessary military messages and furthermore that it could not be done for security reasons.

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(48) On or about February 4, 1942, Captain Michelson received written and oral orders from the Australian Naval Control Officer at Darwin to proceed to Wyndham, Australia, discharge the gasoline and return to Port Darwin. The Master told the United States Naval Observer at Port Darwin, Commander Collins, that he objected to being ordered about by foreign naval authorities but was instructed that it was necessary to follow such orders because of the necessity of co-operating in a desperate situation.

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(49) Pursuant to orders of the Australian Naval Control the *Portmar* sailed in convoy of an Australian corvette from Port Darwin on February 4, 1942, and arrived at Wyndham on February 8, 1942. The gasoline was discharged pursuant to arrangements made by American Army authorities. The *Portmar* sailed from Wyndham on February 10, 1942 and arrived again and anchored at Port Darwin on February 12, 1942.

(50) Pursuant to orders of the Australian Naval Control officer, the Master berthed the *Portmar* on February 13, 1942. Thereupon, on February 13 and 14, 1942, the Master of the *Portmar* was ordered by the U. S. Army Commander to discharge all dunnage and take on board a detachment of three to four hundred officers and men of the 148th Field Artillery, with their field guns, military stores, supplies,

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equipment and ammunition, and a motor launch, the *Nevbet*, belonging to the Australian Army.

(51) The Island of Timor was then in the hands of the allies of the United States. Japanese troops did not land on Timor until March 1, 1942.

(52) On the night of February 14, 1942, the Master was ordered by the Australian Naval Control officer to report on board the cruiser USS. *Houston*. The Master obeyed this order, and there met, at a convoy conference the master

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of three other merchant vessels, Captain A. H. Rooks, commanding officer of the *Houston*, and the commanders of other naval vessels.

(53) At the convoy conference the Master was handed orders by the Australian Naval Control officer which were explained by Captain Rooks, to the effect that the *Portmar* and the three other merchant vessels were to proceed for Koepang, Timor, in convoy of the *Houston*, the United States Destroyers *Preston* and *Perry* and four Australian corvettes; that it would be a very dangerous mission, that Koepang Harbor was going to be a "hot place", that he

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would escort the convoy up to the entrance but not into the harbor. Prior to this time, the Master had heard that an "*Empire Airways*" flying boat had been destroyed by enemy action en route between Darwin and Koepang on January 29, 1942; and, it was then generally known in Darwin that on February 13, 1942 the port of Koepang had been bombed by the Japanese. Pursuant to these orders the *Portmar* sailed in convoy from Port Darwin at 1:30 a.m. on February 15, 1942, carrying men and materiel to aid in the defense of Koepang.

(54) On February 15, 1942 while steaming across the Timor Sea the convoy was attacked by two Japanese planes and was ordered to disperse. Bombs dropped by those planes did not fall near the *Portmar*. Shortly thereafter

the convoy was ordered to reassemble and continue toward Koepang.

(55) On the morning of February 16, 1942 while steaming across the Timor Sea the convoy was attacked by a squadron of Japanese bombers. This attack lasted about forty-five minutes; many bombs were dropped near the *Portmar*, and she was severely shaken. After the attack, the Master received reports from the Chief Mate and Chief Engineer that the bombing had shaken paint and scale loose from the frames of the vessel, had unsettled parts of the 2168
machinery and fractured certain bilge lines. The Master observed that the vibrations of the vessel under way had somewhat changed.

(56) The point at which the convoy was attacked was about two hundred and fifty (250) miles from the route along which the *Portmar* had been directed to proceed by the instructions issued to her Master by the United States Navy in San Francisco.

(57) There is no evidence that the danger of attack by Japanese planes at the point where the *Portmar's* convoy was bombed was then any greater or less than the danger 2169
of such attack along the route originally assigned the *Portmar* by the United States Navy when she sailed from San Francisco.

(58) After the enemy attack of February 16, 1942 the convoy was ordered by the Commanding Officer of the USS. *Houston* to return to Port Darwin. The *Portmar* arrived again at Port Darwin and anchored there at 12.55 p. m. on February 18, 1942 at a position designated by the Australian Naval Control Officer. She was ordered to await her turn at a specified discharging berth, and upon reaching her turn, to dock and discharge her military supplies, equipment and personnel.

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(59) Later the Australian Naval Control officer gave orders that the *Portmar* was to be docked the next day, February 19, 1942, but that order was countermanded early the next morning. The *Portmar* remained at anchor.

(60) On February 19, 1942, at about 9.55 a. m., Japanese airplanes attacked the vessels in the harbor at Port Darwin. As a result of this attack, in addition to damage to the *Portmar* and other disasters, SS. *Neptune*, the destroyers USS. *Perry* and USS. *Preston* and a British motor ship
2171 were destroyed.

(61) When the attack began the Master ordered the life boats swung out and lowered to the main or weather deck level. The Japanese planes attacked the *Portmar* with bombs and gunfire as she lay at anchor. Two bombs were dropped close to the port side of the *Portmar*. The first bomb went through the aft life boat on the port side, completely destroying it. The bomb exploded within twelve feet of the port side of the vessel in the vicinity of the engine room, and split the forward life boat in two parts. The second bomb was dropped and exploded within fifty feet of the port side of the vessel.

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(62) At the same time the vessel was subject to continuous machine gun and aerial cannon fire by Japanese fighter planes. One of the crew was killed and several of the crew and military personnel were seriously wounded.

(63) As a result of said air attack the vessel sustained severe and extensive damage; the port side was perforated with holes above and below the water line; three of the cargo booms fell as the rigging was shot away; the decks were penetrated fore and aft; the accommodations were blasted and wrecked; the ship began to take water in the No. 4 and 5 holds through the holes near or below the water line; fire broke out in the munitions in No. 4 hold; the Master decided to beach the vessel, if possible, before she sank in the harbor.

(64) The vessel weighed anchor with difficulty due to punctures in the steam lines. Japanese aircraft continued their attacks. The engine room telegraph, the standard compass and the steering compass were demolished. The Second Officer was shot down as he stood at the engine telegraph on the bridge.

(65) The *Portmar*, navigated by the Master, proceeded to the southerly part of the harbor, anchored at 1.05 p. m. on February 19, 1942 off Channel Island, at which time the Master ordered the military personnel disembarked by the 2174
Australian corvette *Vigilante* and the launch *Nevbet*. Due to the damage to the bilge lines, sea water which entered the leaking hull could not be pumped out. As more water entered the list of the vessel to port increased. She was unable to handle her anchors or to manoeuvre to avoid attack in the event of another air raid. After she succeeded in disembarking her military personnel, her Master beached her.

(66) The Master directed the *Portmar* toward a cove on the eastern shore of the harbor. With no compasses and navigated by lead line and visual observation of the shoals, 2175
the *Portmar* grounded on her starboard side from about midships to aft at 2:12 p. m. at lat. 12° 34′ S; long. 130° 52′ E. at a point about six miles south of the town of Darwin. The mean draft of the vessel at that time was 12.11 feet.

(67) The tidal range at the point where the *Portmar* lay on the beach was about 27 feet. At low water the *Portmar* was submerged from the aft end of the ship to the aft end of midship house; at high water the water was over the poop and forward into the shelter deck.

(68) The list of the vessel to port increased with the ebb of the tide and more holes were put below water. Between 4.00 p. m. and 5.00 p. m. on February 19, 1942, the Chief Engineer reported to the Master that he could not

control the entry of water and that the boilers might blow up as the list increased. When the list increased to about 40°, the Master feared, and justifiably so, that the vessel would turn over and the boilers would explode. He personally dropped the port anchor to hold the vessel in position and ordered the crew off the vessel. They were taken off by the Australian corvette *Vigilante*.

(69) The Master ordered the Chief Officer and Chief Engineer to keep the crew together, to go to Darwin and
2177 get in touch with the American military authorities and see that the crew were taken care of. The Master and three members of the crew whom the Master asked to stay with him, went aboard the launch *Nevbet* and moved a short distance away from the ship because it was feared that she would turn over, and also because of fear of further attack by Japanese aircraft.

(70) After dark and the beginning of the flood tide the list of the ship decreased somewhat. The Master went on board the ship again with two of the men and remained most of the night. On February 20, 1942, when daylight came, the men would not stay aboard the ship because of
2178 fear of further attack by Japanese aircraft. There was no drinking water nor water for sanitary purposes, and neither steam nor electricity. The Master went with the men to the shore a little to the South of Channel Islands and hid in the mangroves. From that point the Master saw Japanese aircraft bombing the town of Darwin and the area to the south. The Master returned to the vessel several times during the day and inspected the condition of the vessel. He remained on board the night of February 20-21, 1942 and all during daylight on February 21st.

(71) Late in the afternoon of February 21st at about 4.05 p. m., the Master left the vessel in the launch and went ashore to get drinking water. Before leaving the

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vessel on that occasion he lowered the starboard anchor personally in order to prevent the vessel from getting into a worse position in the event of a cyclone, which might reasonably be expected at that time of the year. While the Master was ashore near the Channel Islands, a launch came down the harbor carrying the chief mate, Colonel Petterson, the commanding officer of the 148th Field Artillery Regiment, United States Army and Captain John Protheroe Williams, a professional salvor, who was also connected with and later employed by the Australian Commonwealth Salvage Board.

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(72) The field guns in the holds of the *Portmar* were urgently needed by the United States Army, and Col. Petterson wanted to see if the guns could be salvaged. The guns were under water as the ship then lay. Col. Petterson and Capt. Williams examined the vessel with Captain Michelson for the purpose of ascertaining where and how the artillery was stowed and considering the means of salvaging it. Nothing was said and no discussion was had of the possibility of salving the vessel.

(73) After this examination of the vessel on the evening of February 21, 1942, Captain Michelson went ashore with Col. Petterson, and Capt. Williams remained aboard the ship waiting for an Australian corvette to take him ashore. Capt. Michelson took the ship's secret documents with him and turned them in to the Australian Naval Control officer in Darwin, taking a receipt for them.

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(74) The Master tried to find a public official before whom he could note a protest but was unable to find any at Darwin. The Master then went by military truck to a United States Army camp about twenty miles south of Darwin and there reported to the commanding officer Col. La Rue. At this camp, on the evening of February 21, 1942 Capt. Michelson endeavored to send a cable message to

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Calmar Steamship Corporation but was unable to do so. He remained there overnight. On February 22, 1942, with the chief officer, Mr. Bullock, the Master returned to the *Portmar* in order to save as much of the ship's provisions as possible in order to feed the officers and crew at the camp. The Master remained on board the *Portmar* during the night of February 22-23 while a launch was taking the provisions from the *Portmar* to shore. The Master also remained on board on the following night.

2183 (75) During daylight hours while the Master was at or near the *Portmar*, he saw Japanese aircraft attack Darwin and the harbor practically every day. No bombs fell near the *Portmar*.

(76) As the *Portmar* lay aground on the starboard side, the rise of the tide caused her bow to lift and the ebb of the tide caused her bow to fall again. The Master properly considered that this inflicted severe strain twice each day on the hull of the ship.

(77) On February 23, 1942 the Prime Minister of Australia refused to consent to the diversion to the defense of
2184 Burma of a homeward-bound Australian division.

(78) A Japanese invasion of Northern Australia was momentarily expected. The American troops in that area had but few supplies and equipment and were short of ammunition. The commanding officer of one of the American regiments told Capt. Michelson that "every vehicle in my outfit is turned south and ready to go the minute the Japs come." All the civilian shops had been closed and civilians evacuated. The only authority then in Darwin was the Allied Military authority.

(79) A series of disastrous reverses suffered by the Allies (ABDA) in Malaya, both on land and sea; led to the fall of Singapore on February 15, 1942. This was followed

by the Battle of the Java Sea and Sunda Strait with the loss of USS. *Houston* and other Allied naval vessels, and the loss of the aircraft carrier USS. *Langley*, destroyed by Japanese aircraft between Australia and Java, February 27-March 1, 1942.

(80) On March 1, 1942 the Japanese invaded the Island of Java and occupied the western part of the Island of Timor.

(81) On February 24, 1942 the Master returned to the military camp and thereafter, he, the officers and crew of the *Portmar* were used by the American military authorities to unload drums of gasoline from a vessel called the *Admiral Halstead*. The discharge of gasoline was done only at night. The *Admiral Halstead* was kept at anchor in the daytime and brought into the dock at night.

(82) During the interval between February 24, 1942 and March 2, 1942, Capt. Michelson returned frequently to the *Portmar*. He applied to the Australian Naval Control at Darwin for a watchman to prevent looting of the vessel. He examined the ship on each occasion he went aboard and found Capt. Williams making preparation for removal of the guns from the vessel. He did not observe Capt. Williams doing anything toward salvage of the vessel itself. No watchmen were posted on the *Portmar* while she lay on the beach because none could be secured by Capt. Michelson. The position of the *Portmar* as of March 2, 1942 was about the same as it was when the Master left her on the night of February 24, 1942. Capt. Michelson returned to the vessel on March 3, 1942 and left her on the evening of March 3, 1942. He never saw the *Portmar* again at Darwin. Between March 3rd and 10th, the Captain and the crew were confined by the military in the camp of the 147th Field Artillery, because of a dispute as to whether or not the officers and crew of the *Portmar* were to continue to be

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used for further stevedoring work in the harbor, while they contended that troops and Australian stevedores were available for such work.

(83) While under arrest in camp, the Captain made an effort to obtain transportation for himself, his officers and crew to Adelaide in order to get in touch with the owner of the *Portmar* and report on the events that had occurred.

(84) The judgment of the Master of the *Portmar* on
2189 leaving the ship for the last time on March 3, 1942 was that salving the ship, repairing her and restoring her to her former condition was then impossible because of her condition and the general situation. There were no facilities—no ships, no mechanics and no material of any kind available at Darwin for raising, towing or repairing her; there was not a pump in Darwin with which to raise the vessel and no power to run one. Before anything could be done to repair her, she had to be moved from Darwin, two thousand miles to the nearest port; the nearest dry dock large enough to handle the *Portmar* was at Sydney. She had to be towed through waters dominated by the Japanese; after
2190 arrival in any port of Australia with facilities they would not be adequate to restore her to pre-disaster condition. There were other wrecks that had gone without assistance. No facilities were available in all Australia for raising or towing her to anyone except military authorities. Japanese continued to be expected every day. The Master's judgment was that it was highly probable that the cost of recovering and repairing the *Portmar*, if at any time this could be undertaken and accomplished, would exceed the value of the ship. His opinion on March 3, 1942 remained unchanged on March 10 and continued the same on April 8, 1942.

(85) The condition of the *Portmar*, as she lay on the beach when the Master last saw her on March 3, 1942, was

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one of widespread and general damage by bombs and aerial gunfire. The sea was running in and out of her, carrying mud, muck and fuel oil through holes in the hull; she was almost full of water in No. 4 and 5 holds, the engine room, boiler room, shelter deck and poop; the piping in the engine room and holds was shattered and bare of covering; the boilers had been shifted in their saddles and the auxiliaries had shifted in their foundations; all quarters and accommodations were demolished and shattered; the woodwork and fittings in No. 4 and 5 holds were damaged; the standing and running rigging and most of the booms were damaged and had fallen to the decks; the navigating equipment of the ship was damaged or destroyed; the ice machine and all refrigerating machinery was damaged; the decks, steam piping, smokestacks, ventilators, engine room, fire room and skylight were shattered and perforated from fore to aft; the radio house was blown off its foundation and all the instruments were damaged or destroyed; the telemotor piping and the steering controls were perforated; the lifeboats had been destroyed; and, the electric wiring in the ship had been generally damaged and broken by the effect of bomb concussion in the quarters.

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(86) The Chief Officer of the *Portmar,* who also held a master's license, confirmed the judgment of Capt. Michelson that it was highly probable that the cost of recovering and repairing the vessel would exceed her value when repaired. In the judgment of Chief Officer Bullock, the situation of the *Portmar* was hopeless as to salvage, repair and reconditioning.

(87) The military situation as of March 3rd and 10th, 1942, was that the United States Navy had abandoned Port Darwin and moved to the Exmouth Gulf, fifteen hundred miles to the southwest of Darwin. There was a small detachment, about fifty American soldiers on the Cape York Peninsula which had been otherwise completely evacuated

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down to Brisbane. A Japanese invasion of northern Australia was constantly threatened. A defense line had been set up fifteen miles north of Melbourne on the south coast. The Japanese held the Tanimbar Islands only three hundred miles away. Japanese surface craft and submarines controlled the seas, and the Japanese air force dominated the air. The situation of peril which had existed since December 9, 1941 was daily increasing.

(88) On March 10, 1942, the master, officers and crew
2195 of the *Portmar* were put on a train at Darwin; they were escorted to the train by an armed, military guard.

(89) The route to Melbourne from Darwin was by a narrow gauge railroad about 250 miles from Darwin to Birdum, thence by truck about 500 miles across the desert to Alice Springs, thence by railroad about 1500 miles via Adelaide to Melbourne.

(90) During the railroad trip between Alice Springs and Adelaide, Chief Officer Bullock saw a gondola car on a siding with large centrifugal internal combustion engine driven pumps in it. The gondola car was in a train bound
2196 the other way. He went over to the car and examined the pumps and found that they were addressed to Captain Williams at Darwin. Chief Officer Bullock told Capt. Michelson about these pumps. They were the pumps later used by Capt. Williams in pumping out the *Portmar*. They were obtained by the Australian government and sent to Capt. Williams from South Australia, 2,000 miles overland at government direction and expense. No private, individual shipowner could have obtained them or any other salvage equipment or facilities. No commercial arrangements for the towage to Brisbane could have been made.

(91) Up to the time of departure from Darwin, the Master of the *Portmar* had not been able to send any word to Calmar Steamship Corporation. When he boarded the

train at Darwin on March 10, 1942, he planned to get in touch with Calmar as quickly as possible to advise it fully of what had happened and to request and carry out its instructions.

(92) On March 22, 1942, the Master, officers and crew of the *Portmar* arrived at Melbourne. The master noted protest and extended his protest both before a notary public and the American consul.

(93) The master employed Malleson Stewart & Co., Solicitors, of Melbourne, to represent and protect the interests of the vessel and her owner, Calmar Steamship Corporation. 2198

(94) The officers and crew were repatriated from Melbourne on or before April 17, 1942. The Master remained in Australia and endeavored by all possible means to return to Darwin, and failing in this, to get information as to the situation of the *Portmar* and what was being done with her.

(95) The first salvage operations of Capt. Williams were directed toward the saving of the field guns.

(96) While working on the salvage of the artillery on the vessel, he found the ship less badly damaged than he had thought and that the vessel might be floated. Late in March or in early April Colonel Plant of the United States Army Transport Service ordered Capt. Williams to endeavor to float the vessel. By temporary patching of the shrapnel holes at low water, and utilizing the pumps and by repeating that process on successive tides, he finally got the ship free of water and kept it so with the pumps. The vessel was pumped out, by means of the pumps sent to Darwin by the Australian government, and floated on April 5, 1942. Capt. Michelson first learned that the vessel was afloat on April 13, 1942. 2199

(97) The fact that the vessel was afloat at Port Darwin did not change the master's judgment as to the hopeless situation of the vessel.

2200. *Opinion of Ryan, D. J., with Findings of Fact and Conclusions of Law.*

(98) On February 23, 1942, Calmar Steamship Corporation received a telegram from War Shipping Administration advising that the *Portmar* was reported to have been badly damaged in an air raid at Port Darwin, extent of damage unknown. On March 24, 1942, Calmar Steamship Corporation received the following cable message from the master of the *Portmar*:

"SHIP ACCESSIBLE HALF LENGTH AT LOW TIDE MY OPINION EXCESSIVE DAMAGE MAKES SALVAGE IMPOSSIBLE STOP
2201 HAVE YOU ANY INSTRUCTIONS I SHOULD FOLLOW TO PROTECT OWNERS INTERESTS"

(99) On March 30, 1942, Malleson Stewart & Co., libelant's solicitors at Melbourne, sent Calmar the following cable message:

"CONSULTED BY MICHELSON SHIP FOUNDERED STOP ACCESSIBLE HALF LENGTH AT LOW TIDE BUT MICHELSON CONSIDERS CONSTRUCTIVE TOTAL LOSS STOP RECOMMEND TENDER ABANDONMENT STOP MICHELSON JUST ARRIVED AND PROTEST NOTED STOP DELAYED ARRIVAL AND PROTEST
2202 COMPLETELY JUSTIFIED STOP APPLY NAVY FURTHER PARTICULARS STOP ACKNOWLEDGE"

(100) On April 4, 1942, Calmar Steamship Corporation received the following letter dated April 3, 1942 from United States Maritime Commission, War Shipping Administration:

"April 3, 1942.

S. S. *Portmar*

Dear Mr. Warley:

On February 23rd we received advices through the Navy to the effect your SS *Portmar* was damaged in an air raid February 19th, 1942 at Port Darwin.

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We were advised the extent of the damage to the ship and further details with respect to the crew unknown.

"On April 1st we received through Navy channels a despatch from the Naval Observer, Melbourne, reading as follows:

'Darwin advises *Portmar* aground amidships to stern perforated port side by shrapnel. Does not believe can be salvaged as cargo carrier but might be as hulk or floating store.'

2204

Very truly yours,

(Signed) J. C. OUTLER
J. C. Outler
Chief, Ship Control Section
War Shipping Administration"

(101) On April 7, 1942, Calmar Steamship Corporation instructed Mather & Co., Philadelphia, to tender abandonment of its interest in SS. *Portmar* to the war risk underwriters, and on April 8, 1942, abandonment of its interest in SS. *Portmar* was tendered to the underwriters through Thomas Stephens & Sons, Ltd., London. The underwriters rejected the tender of abandonment but agreed that libelant would be in the same position as though a writ had been issued on that day.

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(102) On April 8, 1942, the condition and situation of the vessel, save that the initial step of pumping her out had been accomplished, remained as it was after her beaching, except that she had some temporary patches in the holes in her sides. She was still afloat at Darwin, but kept so only by operation of the pumps. The vessel's owner could not have arranged to retrieve and restore her to pre-disaster condition. The military situation in Australia was that the Japanese forces had driven as far east as to include all of

the Dutch East Indies and an invasion of the northern part of Australia was threatened. The United States Army Transport Service was in desperate need of every vessel afloat or which could be made to float. No regard was paid to the charter commitments or commercial considerations affecting any available vessel.

(103) After the engagement of the Coral Sea—May 4-9, 1942—the United States Army decided to tow the *Portmar* to Brisbane and arrangements were made through
2207 Capt. Williams to accomplish that towage. There was no possibility of obtaining any naval escort in waters dominated by the Japanese west of the Torres Strait. The personnel of the tug were carefully picked; they were undertaking a very hazardous voyage.

(104) The towage of the *Portmar* from Darwin to Brisbane began on or about June 25, 1942 and ended at Brisbane on or about July 29, 1942. Two tugs were employed and a riding crew was on board the *Portmar*. The tow made a long detour around Melville Island and through the Gulf of Carpentaria, following the shore line, running only by night and hiding in coves by day. They were passing through
2208 waters completely dominated by the Japanese until they rounded Cape York and got down off Queensland Coast.

(105) The reasonable out-of-pocket cost of the services and equipment furnished to the *Portmar* and to the Australian Commonwealth Salvage Board in raising and towing her from Port Darwin to Brisbane was $55,130.; the cost to a private commercial interest would have been more and the reasonable value of the services much greater. The services, facilities and equipment furnished were not available at the time to any but the military and government agencies and to those working under the direction and on behalf of such agencies.

(106) When the *Portmar* arrived at Brisbane on July 27, 1942, her master left Melbourne to meet her and arrived at Brisbane on July 29, 1942. He had a pass signed by Col. Plant of the Army Transport Service. When he sought permission to go on board the vessel and presented the pass, a sentry barred him from admission. The *Portmar* was and continued to be under the exclusive control of the United States Army.

(107) The Master then applied to Col. Grimm in charge of the United States Army Transport Service at Brisbane 2210
for leave to go on board the *Portmar*. Col. Grimm endorsed the master's pass but Capt. Michelson was again barred from the vessel. He had to get a letter from Capt. Williams in order to get on board.

(108) At Brisbane, the master of the *Portmar* employed Capt. R. Douglas Taylor, a Brisbane representative of the American Bureau of Shipping, the British Corporation and Norwegian Veritas, and his engineer assistant, Lieutenant-Commander A. G. Horn of the Australian Navy, to survey the damage sustained by the *Portmar*. Thereafter, the Master of the *Portmar* received a preliminary 2211
report of survey signed by Lt. Commander Horn and later a complete survey report signed by R. Douglas Taylor and A. G. Horn dated September 19, 1942. In the latter survey report the surveyors estimated the cost of repairing the *Portmar* in such manner as would regain for her her former Classification, at approximately £120,000 Australian. That sum, at R/Ex.3.25 was equivalent to $390,000. Such repairs could then have been performed in Australia only by military or government agencies and under their direction and control.

(109) On or about August 19, 1942, the Commonwealth of Australia through the Crown Solicitor, made demand for £100,000 Australian as an award for salvage services rendered to the *Portmar*.

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(110) Thereafter a salvage claim of £50,000 Australian was made by United Salvage Proprietary Ltd. and John Protheroe Williams, for salvage services rendered in raising and floating the *Portmar*.

(111) Temporary repairs were undertaken and performed by a military detail of the United States Quartermaster Corps under the command of Major Haggett, utilizing scrap materials available in a local shipyard and from the wreck of a Liberty ship in Brisbane Harbor.

2213 (112) The temporary repairs made by United States Army labor at Brisbane consisted in cleaning up the vessel, patching up the holes in the sides and superstructure, renewing booms and rigging, refurnishing after quarters, repairing leaks in the double bottom tanks. Holes in the hull were repaired by welding patches over the holes. The work was a patch-up job. The work done at Brisbane was not intended to and did not restore the vessel to commercial operating condition in class; under Major Haggett's orders only the minimum work was done, such as to permit the vessel to be operated in Australian waters during the war.

2214 (113) On November 17, 1942, at twelve noon Eastern Australian time, the United States, acting by and through the War Shipping Administration, requisitioned title to SS *Portmar* at Brisbane, Queensland, Australia.

(114) The *Portmar* arrived at Sydney November 22, 1942 and was there placed on drydock for examination below the water line. Some additional repairs were there made.

(115) While the *Portmar* was on dry dock at Sydney, and thereafter, a further survey of the *Portmar* was made at which the owner, the war risk underwriters and the United States were represented. After all the patch work repairs had been completed, the surveyors issued a joint

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report, dated Sydney, February 15, 1943, in which it was stated that the cost of all damage repairs necessary to restore the *Portmar* to the condition she was in prior to being bombed in the Timor Sea and at Darwin in February, 1942, would amount to approximately £28,000 Australian.

(116) The estimate contained in the Sydney Survey Report dated February 15, 1943, did not adequately measure the extent of the damage sustained by the *Portmar* in said enemy attacks. The estimate was made after considerable repair work had been done on her. All but one of the surveyors who signed the report never saw the *Portmar* until she arrived at Sydney, after a large amount of repair and reconditioning at Brisbane. The Sydney estimate was not an actual figure on which tenders for repairs were to be sought from shipyards, nor were specifications for such work ever prepared. All of the repairs required by the Army authorities for military purposes had already been done.

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(117) After completion of the patch-work repairs at Brisbane and Sydney, the *Portmar* made two or three trips for the United States Army and then was torpedoed and sunk.

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(118) The sound value of the *Portmar* for all purposes of these proceedings, so far as material, was $688,000.

(119) Libelant incurred and paid expenses in maintaining the Master of the *Portmar* including lodging, meals and transportation charges, also fees of surveyors, fees and disbursements of the Melbourne solicitors and other miscellaneous expenses and disbursements in and about the Defense, Safeguard and Recovery of the vessel, and the underwriters' interest in it.

(120) The salvage claims of the Commonwealth of Australia for £100,000 Australian and of United Salvage

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Proprietary Ltd. and John Protheroe Williams for £50,000 Australian were litigated in the High Court of Australia and were defended by Calmar Steamship Corporation under agreements with the war risk underwriters herein and with the United States, that the defense of said actions was to be without prejudice to any of said parties.

(121) The suit of the Commonwealth of Australia was dismissed. The suit of United Salvage Proprietary Ltd. and Williams resulted in a salvage award of £5,000 Aus-
2219 tralian with costs of £1156.9.9. Australian, equivalent at R/ex. 3.25 to a total of $20,008.59. This judgment with costs was paid and satisfied by libelant on February 9, 1944.

(122) On January 8, 1943 the war risk underwriters herein caused Thomas Stephens & Sons Ltd. to inform libelant through Mather & Co., Philadelphia, that they finally declined any liability in connection with libelant's loss with respect to the *Portmar*, by a letter as follows:

"Cl.

Posted 8/1/43 8th January, 43.

2220 MESSRS. MATHER & COMPANY,
PHILADELPHIA

Dear Sirs:

CALMAR S/S CORPORATION

S/S *Portmar*

HULL—WAR RISK INSURANCE

Referring to previous correspondence.

Underwriters inform us that they have given further very careful consideration to this case and have taken legal opinion on the facts, and they now ask us to state their conclusions as follows.

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2221

The facts disclose that after arrival in Australia the vessel discharged her outward cargo and thereafter operated under the orders of the military authorities.

It was in the course of these operations, on a series of local voyages to & from Port Darwin that she became a casualty. These voyages were not even performed as a result of the Owners' decision and quite clearly represented an entirely fresh series of adventures which can by no stretch of imagination be considered as having anything whatever to do with the venture originally insured or with the extension of the insurance to cover the diversion of the vessel to Australia.

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Whether it be held that Underwriters' liability terminated on arrival of the vessel in Australia or when she discharged her outward cargo or when she was ordered into service by the military authorities seems immaterial for, whichever it be, they are definitely persuaded that all liability under their policies had terminated prior to the casualty. They therefore ask us to make it clear that they must, with regret, finally decline any liability in connection with this loss.

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Speaking for ourselves, we have the greatest sympathy for your friends in the situation in which they are placed but it does seem to us that, on the facts, they should be able to establish the liability of the W.S.A. &/or the Australian Authorities and we earnestly hope that they may succeed in obtaining recognition of this liability without further delay.

Yours truly,

THOS. STEPHENS & SONS, LTD.,
Director.

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(Here follow the initials of R. J. Merrett, the leading underwriter and the initials of all the other underwriters.)

(123) Charter hire at the rate specified in Article 1.02 of said Charter for the period beginning February 19, 1942 and ending at noon November 17, 1942, Eastern Australian time, inclusive, amounted to $360,026.71. The expenses saved by the owner of the *Portmar* during said period amounted to $92,220. Charter hire in full was paid the
2225 owner of the SS *Portmar* pursuant to a charter party up to the time of the Japanese attack upon her February 19, 1942; no payment was made by the United States under Article 1.02 of the charter for three staff sergeants on board the *Portmar* as supercargoes, who were victualled from November 28, 1941 to February 19, 1942.

(124) At all material times after February 19, 1942, the *Portmar's* owner considered her to be a constructive total loss, made no attempt to continue to operate her pursuant to her charter to the United States and considered the charter party as terminated and at an end.

2226 These findings of fact having been made, I turn to a consideration of the

CONCLUSIONS OF LAW.

(1) This court has jurisdiction of the libel filed in Admiralty No. 133-332.

(2) This court has jurisdiction under Sections 1 and 2 of the Suits in Admiralty Act, 46 U. S. C. A. 741-42 of the libel filed in Admiralty No. 129-295, over all claims arising out of the charter.

The *Portmar* was operated "for the United States."

The *Portmar* was not owned by the United States; the charter provided that the vessel should be operated by the owner and not the charterer. It was a time or voyage

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charter and not an actual demise of the vessel. *United States* v. *Shea* (1894), 152 U. S. 178; *The Steel Inventor* (1940), 35 F. Supp. 986.

The arguments now advanced by the Government are opposed to the position taken by it in *Matson Navigation Co.* v. *United States* (1932), 284 U. S. 352, 356, 359. There it was urged that the time charter was a contract for the operation of a vessel "for the United States"; here, the contrary is urged. This is sought to be justified because of "certain peculiarities of World War I charters which 2228
expressly provided that the vessels thereby chartered to the Government were to be operated 'for the United States' and granted the Government such extensive control over the details of their operation and management as to make them in effect actually demise or bareboat charters of the vessel * * *."

It is true that in the *Matson* charter it was recited that the ship was to be operated "for the Government". The omission of the words "for the Government" in the instant charter effected no change in the status of the vessel different from that under the *Matson* charter. The *Portmar* was operated on the voyage in the Government service; it 2229
was operated "for the United States" by the terms of the charter even though the label was lacking.

The charter provided for the total and exclusive use of the vessel's carrying capacity; by its terms "the owner agrees to let and the charterer agrees to hire the vessel * * *" (Art. 1[illegible]); the compensation to be paid is stipulated at $4.70 per ton of the vessel's deadweight capacity"; this, to cover not only the use of the ship, but in full the "service to be rendered and expense incurred in its operation and maintenance, all of which undertakings are characteristically within the admiralty jurisdiction." *Matson Navigation Co.* v. *United States, supra*; 358.

The *Portmar* was employed as a merchant vessel.

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She was chartered "for trading for one round voyage" (Art. 1.01); she was privately owned and operated for the profit of the owner, in charge of a master and crew, selected and employed by the owner and responsible to it alone. That the cargo was public stores and munitions did not render "public" the character of the vessel. She was owned neither absolutely nor *pro hac vice* by the United States. Public service did not alter the merchant character of the vessel nor impart to her, when operating under the
2231 voyage or time charter, sovereign immunity.

(3) The plain purport and intendment of the insurance provisions of the charter between libelant and respondent United States of America was that libelant and its underwriters should assume all risks insured pursuant to such provisions and that respondent United States should not be liable under the charter for insured losses.

(4) The agreement of underwriter respondents to hold the *Portmar* covered for diversion to Australia modified the terms of the policies in suit and operated only to extend the coverage and war risk insurance to port or ports in
2232 Australia whilst there, and return to United States Pacific or Atlantic ports via Panama Canal.

The policies in suit were written for a round voyage. The cable of the underwriters changed and modified the coverage only to the extent of changing the port of destination on the outward voyage "to Australia" instead of "to the Philippines." Full premium had been paid and accepted for war risk cover on a round voyage. The words "to Australia" may not be torn from their context, (*O'Brien* v. *Miller*, (1897), 168 U. S. 287, 297), and the return voyage remained covered as provided for in the policies.

(5) Any departures of the *Portmar* from the voyage described in the policies in suit were made for the safety

of the vessel or under compulsion of sovereign military authorities, and were involuntary on the part of the libelant and the master. No deviation or change of voyage occurred or operated to terminate the policies or to relieve the underwriter respondents from liability.

The underwriters urge that there were deviations on the voyage of the *Portmar* from the voyage contemplated at the time the insurance was executed. That changes in the voyage were made is not disputed; that if these were voluntarily made, the policies in suit would have been voided, 2234
is not challenged. I have found that the changes in the voyage were of an involuntary nature, that they were made under military compulsion, from the necessity of existing conditions or for the safety of the vessel. It has long been settled and accepted that,

> "Nothing is more clear than the general principle that a deviation never puts an end to the insurance, unless it be the voluntary act of those who have the management of the ship. Here the state of the case excludes the idea of the deviation (as the going to Falmouth has been called) having been voluntary. The ship was carried there by force, and without 2235
> any consent of those who had the management of the ship. Deviation occasioned by force, and deviation occasioned by necessity are the same; for necessity is by force. It is no matter whether it be the want of repair, or any other immediate danger, which renders the deviation necessary. When the deviation is necessary and unavoidable it has no effect on the obligation of the insurer. * * *" *Scott* vs. *Thompson* (1805), 1 Bos. & Pul. (N. R. 181) 185; 127 E. R. 429, 431.

See also, *Aktiebolaget M. Bank* v. *American M. M. Ins. Co.* (*The Ada*) (1925), 241 N. Y. 197; *English Marine Insurance Act*, 1906, Secs. 45(1), 46(1), 49(b)(d) and (e).

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(6) All movements of the *Portmar*, including her arrival in Port Darwin on February 12, 1942, after stopping and discharging her outward cargo at Wyndham, were part of the outward voyage of the *Portmar* and under the coverage and within the war risk insurance of the policies in suit.

(7) The insured voyage was never voluntarily abandoned or terminated by libelant, the *Portmar* or her master. The dunnage was discharged from the *Portmar* on the
2237 orders of the United States Army. The route of the vessel had been controlled from the time of departure on the outward voyage. There is no evidence to support the underwriters' contention that the homeward voyage was ever voluntarily abandoned. It was only because of the intervention of a sovereign that the return voyage was not commenced. See, *North British & Mercantile Ins. Co.* v. *H. Baars & Co.* (C. A. 5, 1919), 255 Fed. 625.

(8) The *Portmar* was not intentionally exposed by libelant, her master or crew to war risks or enemy attack, or to peril or risk of damage or loss.

The Master acted in obedience to orders of his sov-
2238 ereign conveyed to him by officers of the United States Army. He obeyed without requiring the exertion of force to coerce him; it was his duty and obligation to do this, not only as a citizen of the United States, but as master of a vessel flying his country's flag.

As Lord Wright wrote in *Rickards* v. *Forestal L. T. & R. Co.*, 1942 A. C. 50, at p. 80,

> "In one sense it was a moral compulsion, but in another sense it was more because it may be assumed that he was aware that, if he disobeyed the order, his government had means of vindicating its authority if not at the moment, at least subsequently. * * *"

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To constitute a restraint of princes, or a requisition or detainment, it is not essential that there should be the presence of force as distinguished from an order backed by the sanction of force. The immediate presence of sufficient military force to enforce the sovereign's orders was not lacking, however, on February 12, 1942, when the *Portmar* was seized and requisitioned. It was the act of paramount power which prevented the homeward voyage and sent the *Portmar* on to Timor.

(9) The *Portmar* was restrained and detained, and her 2240
use seized and requisitioned without condemnation or transfer of ownership by the sovereign governments of the United States of America and the Commonwealth of Australia on February 12, 1942.

(10) The "Free of British and Allied Capture Warranty" of the insurance policies in suit is not ambiguous, and expert testimony offered to explain, alter or vary its meaning has not been considered.

(11) The loss and damage sustained by the *Portmar* by reason of enemy attacks was not excluded from the coverage of the insurance issued by underwriter respondents in 2241
the "Free of British and Allied Capture Warranty" because it was within an exception to that warranty in the policies in suit.

The damages sustained by the *Portmar* were "consequences of hostilities or warlike operations" within the provisions of the F. C. & S. clause of the marine hull policies. The damages were the direct and immediate result of enemy attack, bombs and gunfire.

It has been found that there was a seizure and requisition of the use, and a restraint of the vessel at the times the damage was inflicted on the *Portmar*. It has also been found that the coverage of the policies had not terminated at the time of these acts of sovereign powers. The re-

straints under which the *Portmar* was operating were the proximate cause of the damage she sustained. *Standard Oil Co.* v. *United States (The Llama)*, (1925), 267 U. S. 76, 78.

The question presented is whether loss and damage to the vessel sustained while such paramount forces were operating are excluded from coverage by the "Free of British Capture" rider of the war risk insurance policies in suit. Were the damages occasioned by the perils insured against?
2243 This must be determined by the language employed in the rider, read in the light of the other provisions of the policy.

The wording of the rider is clear: first, it frees the underwriters of "claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies * * *." This exception, it seems, finds root in the fact that British underwriters were insuring against loss to a vessel flying the flag of the United States. *Cf., Sanday & Co.* v. *British & Foreign Marine Ins. Co.*, (1915) 2 K. B. 781. The reason for this exception is
2244 said to be that "on the principles of English law, it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interest of his own country." *Arnould on Marine Insurance*, 13th ed. Sec. 85. The paramount powers which acted were among those named in the warranty; no claim is, therefore, made against the underwriters for seizure, requisition, restraint or detainment.

The second clause of the rider then continues,

> "* * * but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines, or other implements of war, or by stranding, sinking, burning or collision,

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provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure, or Detention."

The vessel was not condemned; there was no condemnation contemplated during the seizure, restraint, requisition or taking of the *Portmar*. The taking of the *Portmar* was not "by the enemy as prize, in time of open war, or by way of reprisals, with intent to deprive the owner of all dominion or right of property over the thing taken." *Arnould, supra,* Sec. 829; *Andersen* v. *Marten,* (1907) 2 K. B. 248, 253, 1908 A. C. 334.

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The reason for the words "but unless the insured Vessel is condemned" is apparent when one considers that the change of title to a vessel condemned after capture dates back to the time of the taking, and damage to the vessel from enemy action in the interim would not be damage to the property of the assured. The very purpose of the second clause was to continue coverage to the assured while the vessel was under restraint or requisition in the event that condemnation did not follow the taking of the vessel.

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The losses for which libelant claims were covered by the terms of the war risk policies in suit without any reference to the rider. The rider served only to exclude certain risks arising from British capture, seizure, requisition, etc. This exclusion was, in turn, limited in scope by further exceptions, which, expressed in the second clause of the rider, render the provisions of the first clause inoperative as to the losses here claimed. The losses which were the "consequences of hostilities" remained covered under the provisions of the war risk clause because the interest of the assured in the vessel continued and was not terminated by the requisition, restraint and detainment. The damage to and loss of the vessel were excluded from the hull marine policy by the F. C. & S. clause because they occurred while

"the taking of the vessel by requisition and restraint" was in effect and as "the consequences of hostilities or warlike operations."

The losses sustained by the *Portmar* were "otherwise covered" by the policies in suit. At the time of seizure and requisition, the round trip voyage had not been completed; the vessel had not returned to a port in the United States; she had not then lost her status as a private vessel. The conditions as they existed at the time of seizure and
2249 requisition are the tests to be applied in determining whether the vessel was "otherwise covered."

Neither counsel nor I have been able to find any decision or text consideration of the second clause of the rider, but the language is plain and the policies must be read and applied as they were written.

If there had been a capture, requisition or seizure by the enemy and consequent loss by warlike operations, coverage would be beyond dispute. This total and complete coverage against capture, seizure or requisition by Great Britain or her allies could not have been written; the underwriters insured to the full extent for which they might
2250 legally contract; not against such capture, seizure or requisition, but against war risk losses during such capture, seizure or requisition, when not followed by condemnation.

The rider contains no time or geographic limitations on coverage irrespective of what Great Britain or her allies might do with the vessel. Nor is there imposed any restriction on the nature of the operations in which the vessel might be employed. Under the wording of the rider, the insurance would continue during the seizure, and requisition throughout an entire conflict and on innumerable and perilous voyages or missions over the waters of the world. Indeed, that is broad coverage! Yet, it is what the underwriters elected to cover and to read the rider otherwise is to interpolate limitations they did not choose to write.

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This second clause cannot be read, as the underwriters now wish it to be, so as to exclude losses, after British capture, arrest, etc., save those sustained while the vessel is "being detained for inspection" or while she is being brought into a control port for condemnation. It might well have been so drafted; the simple fact appears that it was not.

The policies in suit were written and procured to cover the risks and perils of war. One of the foreseeable incidents of war is that a sovereign may seize, requisition and take a vessel. War risk insurance is written to indemnify against just such losses; premiums are paid for such coverage. The bartered protection provided for by the policies is not to be taken away by judicial action because it is claimed that the underwriters did not intend to write a coverage as broad as the language they used granted.

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(12) The loss and damage to the *Portmar* in suit resulted from a peril of the voyage insured and no additional premium is payable to underwriter respondents pursuant to the "held covered" clause of the policies.

The "held covered" clause becomes operative only when there is a voluntary deviation or change of voyage, made by those in charge of the vessel. "In my opinion, it entitles the shipowner, as soon as he discovers that the warranty has been broken, to require the underwriters to hold him covered. It also entitles the underwriters to exact a new premium commensurate with the added risk." *Greenock S. S. Co.* v. *Martime Ins. Co., Ltd.*, (1903) 1 K. B. 364, 367. Here, the "change of voyage was act and part of the * * * seizure." *Rickards* v. *Forestal L. T. & R. Co.*, *supra* 83. The "held covered" clause does not apply and no additional premium is due.

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(13) All loss and damage sustained by the *Portmar* was within the coverage of the war risk insurance issued by the underwriter respondents to the libelant.

2254 *Opinion of Ryan, D. J., with Findings of Fact and Conclusions of Law.*

(14) The *Portmar* became a constructive total loss within the meaning of the policies by reason of the perils insured against by underwriter respondents.

The policies contain the following clause:

> "No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value."

2255 The American rule is that "if, after the damage is or might be repaired, the ship is not, or would not be worth, at the place of repairs, double the cost of the repairs, it is to be treated as a technical total loss." *Bradlie & Gibbons* v. *Maryland Ins. Co.*, (1838), 37 U. S. 378, 399. The English rule is that the loss is held constructively total when the cost of repairs exceeds the value of the vessel after the repairs. The policies in suit adopt the English rule.

The right of an assured to recover for a constructive total loss in the event of a disaster has been long recognized both in England (*Rickards* v. *Forestal L. T. & R.* 2256 *Co., supra*), and in the United States (*Mason* v. *Marine Ins. Co.*, (C. A. 6, 1901) 110 Fed. 452). This right is preserved to the assured.

So, too, the assured has been long given the privilege to claim a constructive total loss if there is high probability that the cost of recovering and repairing the vessel will exceed her full value when repaired (English rule), or half her value when repaired (American rule).

I do not read the "constructive total loss" clause as a waiver and surrender of the assured's right of abandonment for constructive total loss under the high probability rule. Such interpretation would oblige the assured to wait for completion of repairs, or spend the money itself to repair the vessel and thus determine, in fact, the actual

total cost of repairs before a claim. In *Klein* v. *Globe & Rutgers Fire Ins. Co.*, (*The Tornado*), 1924 A. M. C. 452, aff'd (C. A. 3, 1924), 2 F. 2d. 137, 141, where a claim for constructive total loss was denied because the probabilities did not justify it, a clause identical with those in the instant policies was before the court, and concerning it the following was written by the district judge and quoted with approval by the Circuit Court:

> "It goes without saying that the insured is not required to raise and repair the vessel, to determine 2258
> whether or not the cost would amount to more than the amount that would constitute it a constructive total loss; and, on the other hand, he is not entitled, without investigation and without due foundation of fact or extreme probability of fact, to place the entire burden upon the insurer by an abandonment. He must determine for himself whether he has the right to abandon. If he is able to show that the cost of restoring the vessel, 'so far as any reasonable calculations can be made,' would exceed the amount which would constitute it a constructive total loss, he is safe in abandoning it; but it must be remembered the 2259
> existence of the fact that it would so exceed the amount, constituting a constructive total loss, is the criterion of his right to abandon."

The clause contemplates the application of the high probability rule in determining whether a constructive total loss has occurred.

Abandonment of the insured vessel must be tendered by the assured to the underwriters, if the assured elects to have a partial loss treated as a "constructive total loss."

Concerning abandonment, Chancellor Kent wrote, in 3 *Kent Commentaries*, as follows (p. 321):

> "The right of abandonment does not depend upon the certainty, but upon the high probability of a total

2260 *Opinion of Ryan, D. J., with Findings of Fact and Conclusions of Law.*

> loss, either of the property, or voyage, or both. The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard, and of probable expense, exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense."

See also, *Peele* v. *Merchants Ins. Co.* (1822), Fed. Cas. No. 10,905; 3 Mason 27; *Bradlie* v. *Maryland Ins. Co.*, *supra*, p. 398; *Royal Exchange Assurance* v. *Graham & Morton Co.* (C. A. 7, 1908), 166 Fed. 32.

2261

Abandonment of the *Portmar* was tendered the underwriters on April 8, 1942; by agreement between libelant and the underwriters, that date is to be taken as the date of the commencement of this suit. The right to abandon for constructive total loss depends then upon the facts existing on April 8, 1942, and it is as to this date that the "high probabilities" must be determined. I have made factual findings that the *Portmar* was a constructive total loss on February 19, 1942, after her beaching, and that she was a constructive total loss on April 8, 1942 after she was afloat in Darwin Harbor, when abandonment was tendered the underwriters.

2262

The language of Erle, C. J., in *Adams* v. *Mackenzie* (1863), 13 C. B. (N. S.) 446, and quoted with approval by the Earl of Halisbury, L. C., in *Sailing Ship "Blairmore" Company* v. *Macredie* (1898), A. C. 593, 598, is appropriate:

> "It has been urged on the part of the underwriters that they only intended to become answerable for one of two descriptions of 'total loss,' namely, the actual total destruction of the subject-matter of insurance, and not for that which all persons conversant with insurance business understand as being a total loss. All I can say is, if they so intended they have failed to express their intention."

(15) Libelant's tender of abandonment on April 8, 1942 to underwriter respondent was justified and valid under the terms of the war risk insurance policies in suit.

It has been urged by the underwriters that the "attempted abandonment" was a nullity under the Shipping Act of 1916, Sec. 9, 46 U. S. C. A. 808, and Sec. 37, 46 U. S. C. A. 835, because it was an attempt to pass title without the consent and approval of the United States Maritime Commission to the underwriters all of whom were and are British subjects or British corporations.

2264

It may well be that such approval was not required under the circumstances; however, it is not necessary to so decide now. The negotiations between libelant and the underwriters never reached the point where a transfer of title was made. The tender or offer of abandonment by libelant was rejected. At the time of rejection, the right and authority of the libelant to transfer title in the event of acceptance was not questioned; it was not made in whole or in part the basis of the rejection. If the underwriters had evidenced a willingness to accept a tender of abandonment, the consent of the United States Maritime Commission might have been obtained, whether or not it was necessary. Its absence does not affect the underwriters' liability.

2265

(16) Libelant duly performed each and every term and condition of the war risk insurance policies in suit on its part to be performed.

(17) Libelant is entitled to recover from the underwriters the sum of $860,000, the insured value of the *Portmar* stated in the war risk insurance policies in suit, with interest from April 8, 1942.

(18) Certain monies were expended by libelant as a result of the damage and loss to the *Portmar* which constituted "sue and labor" charges within the provisions of the war risk insurance policies in suit. Libelant is entitled to recover the amounts so expended from the underwriter re-

2266 *Opinion of Ryan, D. J., with Findings of Fact and Conclusions of Law.*

spondents, in addition to the insured value of the vessel above stated.

(19) The sum of $20,008.59 in satisfaction of the judgment for salvage award with costs in the High Court of Australia was paid by libelant for the account of underwriter respondents, and is recoverable from the underwriters with interest from February 9, 1944, in addition to the insured value of the vessel and the "sue and labor" charges.

2267

(20) The *Portmar* did not sustain any loss or damage from any cause which would render respondent United States of America liable therefor under the charter.

(21) The *Portmar* became a constructive total loss on February 19, 1942 within the meaning of her charter to respondent United States of America.

(22) United States of America is not liable to libelant for charter hire in addition to the amounts already paid.

(23) Libelant duly performed all the terms and conditions of the charter to be performed on its part.

2268 (24) Libelant is entitled to a decree against underwriter respondents for $860,000 with interest on this amount from April 8, 1942, and for $20,008.59 with interest on this amount from February 19, 1944; and for an amount of "sue and labor" expenses with interest, as determined by a Commissioner to be appointed by the court, with costs.

(25) The libelant is entitled to recover from the United States of America, respondent, the sum of $238.50 with interest from February 11, 1944, the date on which the libel was filed, and is, accordingly, entitled to a decree against this respondent therefor.

SYLVESTER J. RYAN,
U. S. D. J.

Dated, New York, N. Y., May 25, 1951.

2269

Supplemental Opinion of Ryan, D. J., Fixing Rate of Interest at 6% in Ad. 133-332.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,

against

SYDNEY KEITH SCOTT, one of the LLOYDS UNDERWRITERS, EDINBURGH ASSURANCE CO. LTD., *et al.*,
Respondents.

Ad. 133-332

2270

RYAN, J.:

I find no unreasonable delay on the part of libellant in the prosecution of this suit. I feel that interest should be allowed; the claims asserted are based on contracts. I have only been concerned with the rate of interest to be fixed. 2271
By the "Service of Suit" clause in the policies the respondent underwriters agreed to submit to any court of competent jurisdiction within the United States and to give such court jurisdiction by accepting service of process within this district. This was a submission to the jurisdiction of the New York State courts. This clause and the absence of any provision for interest on unpaid claims implies an acceptance of the New York statutory rate of 6% (N. Y. General Business Law, Sec. 370; N. Y. C. P. A. Sec. 480). Interest is therefore fixed at that rate.

June 27, 1951.

SYLVESTER J. RYAN,
U. S. D. J.

2272

Interlocutory Order and Decree.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,
against
SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.

2273 Ad. 133-332.

The above entitled suit having regularly come on for trial in this Court on the 18th and 19th of January 1951, before Honorable Sylvester J. Ryan, United States District Judge, and the parties having appeared by their respective counsel, and the Court on the pleadings and proof having filed its decision, findings of fact and conclusions of law, it is

2274

ORDERED, ADJUDGED and DECREED that libelant Calmar Steamship Corporation is entitled to recover of and from respondents Sydney Keith Scott, et al. Lloyds Underwriters, Edinburgh Assurance Co., Ltd., Northern Maritime Insurance Co. Ltd., Fine Art & General Insurance Co., Ltd., British Law and Insurance Co., Ltd., Planet Assurance Co., Ltd., Elders Insurance Co., Ltd., and National Provincial Insurance Co., Ltd., Insurance Companies Members of the Institute of London Underwriters, and Excess Insurance Company Limited, of London, a British corporation, respondents, according to their proportionate liabilities, the sum of $860,000 with interest from April 8, 1942; and the sum of $20,008.59 with interest from February 9, 1944; and the amount of "sue and labor" expenses incurred by libel-

ant, with interest; together with the taxable costs of this proceeding; and it is further

ORDERED that this cause be referred to John Spallone, 140 Nassau Street, N. Y. C., as Commissioner to ascertain and compute the amount of said "sue and labor" expenses with interest, and to report to this Court thereon.

Dated, New York, New York, June 27th, 1951.

SYLVESTER J. RYAN,
U. S. D. J. 2276

Stipulation.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION, a Delaware Corporation,
Libelant,
against 2277
SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.
Ad. 133-332.

This Court having heretofore found in its Finding of Fact No. 119, filed herein on May 25, 1951, that

"(119) Libelant incurred and paid expenses in maintaining the master of the *Portmar* including lodging, meals and transportation charges, also fees

of surveyors, fees and disbursements of the Melbourne solicitors and other miscellaneous expenses and disbursements in and about the Defense, Safeguard and Recovery of the vessel, and the underwriters' interest in it." and

This Court having heretofore held in its Conclusions of Law Nos. 18 and 24 that

"(18) Certain monies were expended by libelant as a result of the damage and loss to the *Portmar* 2279 which constituted 'sue and labor' charges within the provisions of the war risk insurance policies in suit. Libelant is entitled to recover the amounts so expended from the underwriter respondents, in addition to the insured value of the vessel above stated.

"(24) Libelant is entitled to a decree against underwriter respondents for $860,000 with interest on this amount from April 8, 1942, and for $20,008.59 with interest on this amount from February 19, 1944; and for an amount of 'sue and labor' expenses with 2280 interest, as determined by a Commissioner to be appointed by the court, with costs." and

The items of said expenses incurred and paid by the libelant, and claimed by the libelant to be "sue and labor" charges within the policies involved in this suit, being listed in Libelant's Exhibit 25A in the aggregate amount of $17,940.34,

It is now, solely as a compromise herein and in order to avoid the expense and delay of a reference pursuant to the interlocutory decree herein dated June 27, 1951, STIPULATED AND AGREED between the parties hereto as follows:

1. In addition to all other amounts with interest and costs recoverable by libelant according to the decisions of

this Court herein dated May 25th and June 27th, 1951 and said interlocutory decree, the final decree herein shall provide that with respect to said charges and expenses referred to as "sue and labor" charges or expenses in the above quoted Conclusions of Law, libelant shall recover of and from the respondent Underwriters the sum of $15,000 with interest on that amount from March 6, 1943. 2281

2. This Stipulation is made without prejudice to the claim of the libelant with respect to such "sue and labor" charges and expenses in any other action or proceeding and without prejudice to respondents' contentions on appeal of this case (1) that none of the expenses listed in Libelant's Exhibit 25A constitutes a "sue and labor" charge under the policies involved in this suit, and (2) that they are not liable for any of said expenses. 2282

Dated, New York, N. Y., July 6, 1951.

KIRLIN, CAMPBELL & KEATING,
Proctors for Libelant.

MENDES & MOUNT,
Proctors for Respondent Underwriters. 2283

Notice of Appeal.

2284

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware corporation,
Libelant,
against
SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, and EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.

A. 133-332.

2285

Sirs:

PLEASE TAKE NOTICE that Sydney Keith Scott, the Edinburgh Assurance Co., Ltd., Northern Maritime Insurance Co., Ltd., Fine Art & General Insurance Co., Ltd., The British Law Insurance Co., Ltd., Planet Assurance Co., Ltd., Elders Insurance Co., Ltd., National Provincial Insurance Co., Ltd., and Excess Insurance Company, Ltd., and each of them, respondents in the above entitled suit, hereby appeal to the United States Court of Appeals for the Second Circuit from the decree entered herein on the 27th day of June 1951, and from each and every part thereof.

2286

Dated, New York, N. Y., July 11, 1951.

Yours, etc.,

MENDES & MOUNT,
Proctors for Sydney Keith Scott, *et al.*,
Respondents,
27 William Street,
New York 5, N. Y.

To:

KIRLIN CAMPBELL & KEATING, Esqs.,
Proctors for Libelant,
120 Broadway,
New York 5, N. Y.

The foregoing appeal is hereby allowed.

Dated, New York, N. Y., July 11, 1951.

HOLTZOFF, J.

2287

Respondents' Withdrawal of Their Notice of Appeal from the Interlocutory Decree Heretofore Entered Herein on June 27, 1951.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION, a Delaware Corporation, Libelant,

against

SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, EDINBURGH ASSURANCE CO., LTD., *et al.*, Respondents.

2288

Ad. 133-332.

An interlocutory decree in favor of the libelant having been entered herein on June 27, 1951, and an appeal therefrom having been filed by the respondents and having been allowed by this Court on July 11, 1951, and the libelant having now presented to this Court for settlement and signature a final decree awarding recovery to the libelant in a specified amount for all matters for which this suit was brought against these respondents,

2289

NOW, THEREFORE, in order to remove any question of this Court's jurisdiction to enter final decree herein while the appeal from the said interlocutory decree is pending, the respondents herein withdraw the said Notice of Appeal from the said interlocutory decree, without prejudice to their right to appeal from the final decree herein which

2290 *Respondents' Withdrawal of Their Notice of Appeal from the Interlocutory Decree Heretofore Entered Herein on June 27, 1951.*

has been presented for settlement and signature but has not yet been signed by this Court.

Dated: July 16, 1951.

MENDES & MOUNT,

By RUSSELL T. MOUNT,
Proctors for Respondents.

2291

Consented to

KIRLIN, CAMPBELL & KEATING,
Proctors for Libelant.

So Ordered.

Dated: New York, N. Y., July 20, 1951.

ALEXANDER HOLTZOFF,
U. S. D. J.

2292

Final Order and Decree.

2293

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,

against

SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.

Ad. 133-332.

2294

The above entitled suit having regularly come on for trial in this Court on the 18th and 19th of January 1951, before Honorable Sylvester J. Ryan, United States District Judge, and the parties having appeared by their respective counsel, and the Court on the pleadings and proof having filed hereon on May 25, 1951 its decision, findings of fact and conclusions of law; and the Court having filed herein on June 27, 1951 its decision with respect to the rate of interest applicable to the several amounts which libelant is entitled to recover from respondents herein; and the Court having filed herein on June 27, 1951 an interlocutory decree in favor of libelant against the respondents herein; and the parties hereto having entered into and filed herein a stipulation dated July 6, 1951 with respect to libelant's recovery of "sue and labor" charges or expenses with interest; and the policies involved herein issued by Lloyds, London and by The Institute of London Underwriters having provided in effect that the assurers bound themselves thereunder, each to the extent of his or its own part only and not one for any other, it is

2295

ORDERED, ADJUDGED AND DECREED that libelant Calmar Steamship Corporation recover of and from respondents,

2296 *Final Order and Decree.*

according to their proportionate liabilities as provided below, the sum of $860,000 with interest at the rate of six (6%) per cent per annum from April 8, 1942 to the date of this decree, July 16, 1951, such interest amounting to $478,446.64; and the sum of $20,008.59 with interest at the rate of six (6%) per cent per annum from February 19, 1944 to the date of this decree, such interest amounting to $8,893.82; and the sum of $15,000 with interest at the rate of six (6%) per cent per annum from March 6, 1943 to the date of this decree, such interest amounting to $7,525.00;
2297 with costs taxed in the sum of $597.00; amounting in all at the date of this decree to the Total Sum of $1,390,471.05; and it is further

ORDERED, ADJUDGED AND DECREED that the proportionate liability hereunder, with respect to said Total Sum of $1,390,471.05 of respondent Sydney Keith Scott and all other individual respondents who were members of Underwriting Syndicates named in the following Table, part of Lloyd's policy No. D41/11356,

(Here follows a list of the Syndicates which underwrote the Lloyd's Policy, and the amount underwritten by each Syndicate.)

2298 . . . . . .

according to the following Syndicate List attached to said Lloyd's policy,

(Here follows a list of the individual underwriters in each Lloyd's Syndicate and the proportion of the Syndicate amount underwritten by each.)

. . . . . .

be and hereby is fixed and determined by the formula $A \times \frac{B}{860,000} \times T$, in which A represents the fraction set opposite their respective names in said Syndicate List, or the figure "1", where the Syndicate consists of only one person; B represents the amount of insurance underwritten by each said Syndicate, as stated in said Table; the figure 860,000 represents the total amount of the insurance under

all policies here involved; and T represents said Total Sum; and it is further

ORDERED, ADJUDGED AND DECREED that the proportionate liability hereunder of Edinburgh Assurance Co. Ltd. with respect to said Total Sum of $1,390,471.05, be and hereby is fixed and determined by the formula $\frac{30,000}{860,000}$ x T, in which T represents said Total Sum; and it is further

ORDERED, ADJUDGED AND DECREED that the proportionate liability hereunder of Northern Maritime Insurance Co. Ltd. with respect to said Total Sum of $1,390,471.05, be and 2300
hereby is fixed and determined by the formula $\frac{30,000}{860,000}$ x T, in which T represents said Total Sum; and it is further

ORDERED, ADJUDGED AND DECREED that the proportionate liability hereunder of Fine Art & General Insurance Co. Ltd. with respect to said Total Sum of $1,390,471.05, be and hereby is fixed and determined by the formula $\frac{20,000}{860,000}$ x T, in which T represents said Total Sum, and it is further

ORDERED, ADJUDGED AND DECREED that the proportionate liability hereunder of British Law Insurance Co. Ltd. with respect to said Total Sum of $1,390,471.05, be and hereby is fixed and determined by the formula $\frac{16,000}{860,000}$ x T, in which 2301
T represents said Total Sum, and it is further

ORDERED, ADJUDGED AND DECREED that the proportionate liability hereunder of Planet Assurance Co. Ltd. with respect to said Total Sum of $1,390,471.05, be and hereby is fixed and determined by the formula $\frac{4,000}{860,000}$ x T, in which T represents said Total Sum; and it is further

ORDERED, ADJUDGED AND DECREED that the proportionate liability hereunder of Elders Insurance Co. Ltd. with respect to said Total Sum of $1,390,471.05, be and hereby is fixed and determined by the formula $\frac{2,000}{860,000}$ x T, in which T represents said Total Sum; and it is further

ORDERED, ADJUDGED AND DECREED that the proportionate liability hereunder of National Provincial Insurance Co.

2302 *Final Order and Decree.*

Ltd. with respect to said Total Sum of $1,390,471.05, be and hereby is fixed and determined by the formula $\frac{14,000}{860,000} \times T$, in which T represents said Total Sum; and it is further

ORDERED, ADJUDGED AND DECREED that the proportionate liability hereunder of Excess Insurance Company Limited with respect to said Total Sum of $1,390,471.05, be and hereby is fixed and determined by the formula $\frac{30,000}{860,000} \times T$, in which T represents said Total Sum; and it is further

ORDERED, ADJUDGED AND DECREED that libelant shall recover
2303 hereunder of and from each of said respondents interest at the rate of six per cent (6%) per annum on his or its said proportionate liability with respect to said Total Sum of $1,390,471.05 from the date of this decree until payment and satisfaction of the amount of his or its said proportionate liability therefor as above stated; and it is further

ORDERED, ADJUDGED AND DECREED that unless said proportionate liabilities of said respondents hereunder be paid and satisfied, or payment and satisfaction thereof be duly secured by a *supersedeas* bond in proper form and amount with sufficient surety filed herein within ten days after service of a copy of this decree with notice of entry on proctors
2304 for respondents, libelant shall have execution forthwith against said respondents and each of them, their goods, chattels and credits and their stipulators for costs to satisfy said proportionate liability of each of said respondents with interest as aforesaid under this decree; and it is further

ORDERED, ADJUDGED AND DECREED that libelant may at any time hereafter resettle this final order and decree, or may obtain from this Court a further order, setting forth in United States Dollars the amount of proportionate liability of each of said respondents hereunder with interest as aforesaid, and granting to libelant such other, further or different relief as may be necessary to enforce this decree.

Dated New York, N. Y., July 16, 1951.

ALEXANDER HOLTZOFF
U. S. D. J.

Stipulation. 2305

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION, a Delaware Corporation,
Libelant,
against
SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, EDINBURGH ASSURANCE CO. LTD., *et al.*,
Respondents.

Ad 133-332.

2306

A Final Decree dated July 16, 1951 having been entered herein, whereby it was ordered, adjudged and decreed that the libelant, Calmar Steamship Corporation, recover a total of $1,390,471.05 from the respondents herein according to their proportionate liabilities, and that unless the proportionate liabilities of respondents as to said sum be paid and satisfied or payment and satisfaction thereof be duly 2307
secured by supersedeas bond filed herein within ten days after service of a copy of the said Final Decree with notice of entry on proctors for respondents, libelant have execution forthwith against said respondents and each of them, their goods, chattels and credits, to satisfy their respective proportionate liabilities with interest under the said decree, and such service of a copy of said Final Decree with notice of entry having been made, and the libelant having threatened to cause a levy of execution to enforce said decree, it is now

STIPULATED AND AGREED by and between the libelant, Calmar Steamship Corporation, and all of the respondents herein, in order to avoid such execution, as follows:

2308— *Respondents' Notice of Appeal and Allowance.*

1. Simultaneously with the signing of this Agreement, the respondents have paid to the libelant, Calmar Steamship Corporation, the said sum of $1,390,471.05 being the amount of all the proportionate liabilities of the respondents under said Final Decree, and Calmar Steamship Corporation acknowledges receipt of the said payment.

2. Said payment is made with the same force and effect as though collected from the respondents by virtue of a writ of execution under the said Final Decree, and without prejudice to appeal by the respondents from the said Final
2309 Decree or any part thereof.

Dated, New York, N. Y., July 30, 1951.

KIRLIN, CAMPBELL & KEATING,
Proctors for Libelant.

MENDES & MOUNT,
Proctors for all Respondents.

Respondents' Notice of Appeal and Allowance.

2310 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION, a Delaware Corporation, Libelant,

against

SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, EDINBURGH ASSURANCE CO., LTD., *et al.*, Respondents.

Ad. 133-332.

Sirs:

PLEASE TAKE NOTICE that Sydney Keith Scott, The Edinburgh Assurance Co., Ltd., Northern Maritime Insurance

Co., Ltd., Fine Art & General Insurance Co., Ltd., The British Law Insurance Co., Ltd., Planet Assurance Co., Ltd., Elders Insurance Co., Ltd., National Provincial Insurance Co., Ltd., and Excess Insurance Company, Ltd., and each of them, respondents in the above-entitled suit, hereby appeal to the United States Court of Appeals for the Second Circuit from the interlocutory decree entered herein on the 27th day of June, 1951, from the final decree entered herein on the 20th day of July, 1951, and from each and every part thereof.

2312

Dated, New York, N. Y., October 15, 1951.

Yours, etc.,

MENDES & MOUNT,

By RUSSELL T. MOUNT,
A member of said firm,
Proctors for Sydney Keith Scott,
et al., Respondents,
27 William Strect,
New York 5, New York.

2313

To: KIRLIN, CAMPBELL & KEATING, Esqs.,
Proctors for Libelant,
120 Broadway,
New York 5, New York.

The foregoing appeal is hereby allowed.

SYLVESTER J. RYAN,
U. S. D. J.

Dated New York, N. Y., October 15th, 1951.

2314

Respondents' Assignments of Error.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,

against

2315 SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, and EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.

Ad. 133-332.

Respondents, Sydney Keith Scott, *et al.*, hereby assign error in the proceedings, decision, Findings of Fact, Conclusions of Law, and the Interlocutory and Final Decrees of the District Court in the above entitled suit, as follows:

1. The District Court erred in failing to find and hold
2316 that the insured voyage of the SS. *Portmar* had been broken up and terminated, and the coverage of the respondents' insurance policies had terminated, prior to the Japanese bombing of the vessel on February 15, 16 and 19, 1942.

2. The District Court erred in failing to find and hold that after the cargo of the SS. *Portmar* had been completely discharged at Brisbane on or prior to January 9, 1942, she entered upon new independent voyages entirely unconnected with and unrelated to the insured voyage described in the three insurance policies, as changed by agreement to Australia.

3. The District Court erred in holding that insurance on the SS. *Portmar*, originally for a round trip fom the

West Coast of the United States to ports in the Philippines and return, and changed by agreement to Australia, was not, at the very latest, terminated by her departure on an independent and unconnected voyage from Port Darwin, Australia, for Koepang in the Island of Timor.

4. The District Court erred in holding that insurance on the SS. *Portmar,* as a commercial vessel for a round trip from the West Coast of the United States to ports in the Philippines and return, changed by agreement to cover to Australia, continued during her use as a warship, carrying troops, guns, ammunition and a landing barge on a trip from Port Darwin, Australia, for Koepang in the Island of Timor, in an active war area. 2318

5. The District Court erred in holding that either abandonment or break-up of the insured adventure, or change of voyage, or deviation, or deliberate exposure to insured perils, or employment of the merchant vessel as a warship, is excused and rendered involuntary as between assured and its Underwriters, when caused by a risk, such as requisition or restraint, which is specifically excluded from the policy coverage.

2319

6. The District Court, having found as a fact that the use of the SS. *Portmar* was requisitioned by the Australian and United States military authorities for a voyage from Port Darwin, Australia, to Koepang in the Island of Timor, erred in holding that loss or damage during such requisition was not excluded from the insurance coverage of the SS. *Portmar* under the policy clause reading:

> "Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation

by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in co-operation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy
2321 (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention."

7. The District Court erred in holding, with respect to the above quoted clause, that——

"The rider contains no time or geographic limitations on coverage irrespective of what Great Britain or her allies might do with the vessel. Nor is there imposed any restriction on the nature of the operations in which the vessel might be employed. Under the wording of the rider, the insurance would continue during the seizure, and requisition throughout an entire conflict and on innumerable and perilous voyages or missions over the waters of the world. Indeed, that is broad coverage! Yet, it is what the underwriters elected to cover and to read the rider otherwise is to interpolate limitations they did not choose to write."

8. The District Court erred in refusing to consider the evidence as to the meaning of the above quoted policy clause as set forth in the minutes of the meeting of the American Marine Insurance Syndicate, which framed the clause and promulgated it on January 18, 1940, and the testimony of Mr. William D. Winter, the outstanding American authority on marine insurance, as to the meaning of the policy

clause as understood in the American Marine Insurance market in 1941.

9. The District Court erred in failing to hold that the joint survey of the SS. *Portmar*, made at Sydney, Australia (Survey Report dated February 15, 1943, Libelant's Exhibit 49) fixed the cost of repairs necessary to restore the SS. *Portmar* to the condition she was in prior to the Japanese bombing of February 15, 16 and 19, 1942, at $91,000, and that all other surveys of the SS. *Portmar* were *ex parte* and inadmissible in evidence. 2324

10. The District Court erred in failing to find and to hold that the expense of recovering and repairing the SS. *Portmar* did not exceed the sum of $166,738.63, made up of the following items:

(a) Salvage award decreed by the High Court of Australia	$ 20,608.63
(b) Reasonable value of towage from Darwin to Brisbane—not paid, but stipulated for this sole purpose	55,130.00
(c) Cost of repair and reconditioning as agreed by all parties by joint survey report of February 15, 1943	91,000.00
making a total of	$166,738.63

2325

11. The District Court erred in failing to find and hold that the formula set forth in the policy clauses:

> "No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the vessel shall exceed the insured value"

is the sole test of libelant's right to abandon the vessel to Underwriters as a Constructive Total Loss, and that, inas-

much as the expense of recovering and repairing the SS. *Portmar* amounted to less than 20% of $860,000, the SS. *Portmar* was not a Constructive Total Loss, and the attempted abandonment thereof on April 8, 1942, was unjustified, ineffective, invalid and void.

12. Even if the District Court were correct in holding that the "high probability" rule was applicable to the libelant's claim of Constructive Total Loss and its attempted abandonment of the SS. *Portmar* to the respond-
2327 ent Underwriters on April 8, 1942, the District Court erred in holding that that rule was satisfied.

13. The District Court erred in holding that there was or could be a valid abandonment of the SS. *Portmar* to the respondent Underwriters unless the United States Maritime Commission had approved transfer of libelant's title to the SS. *Portmar* to the respondents, under Sections 9 and 37 of the United States Shipping Act—1916; and that respondents were required to state all or any reasons for rejecting the abandonment.

14. The District Court erred in failing to dismiss the
2328 libel with costs.

Dated, New York, N. Y., October 15, 1951.

MENDES & MOUNT,
Proctors for Respondents,
27 William Street,
New York 5, New York.

Final Order and Decree.

2329

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,

against

UNITED STATES OF AMERICA,
Respondents.

Ad. 129-295.

2330

The above entitled suit having regularly come on for trial in this Court on the 18th and 19th of January 1951 before Honorable Sylvester J. Ryan, United States District Judge, and the parties having appeared by their respective counsel, and the Court on the pleadings and proof having filed its decision, findings of fact and conclusions of law, it is

ORDERED, ADJUDGED and DECREED that libelant Calmar Steamship Corporation recover of and from the United States of America, respondent, the sum of $238.50 with interest at the rate of four (4) per cent per annum from February 11, 1944, in the sum of $70.32, with interest on said total sum, according to law from the date of this decree until paid, and it is further

2331

ORDERED that in view of the Findings of Fact and Conclusions of Law made by this Court herein on May 25, 1951, the libel herein be and hereby is in all other respects disallowed, and is accordingly dismissed.

Dated New York, New York, June 27th, 1951.

SYLVESTER J. RYAN,
U. S. D. J.

2332 **Libelant's Notice of Appeal and Allowance.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,

against

Ad. 129-295.

2333 UNITED STATES OF AMERICA,
Respondent.

Sirs:

PLEASE TAKE NOTICE that Calmar Steamship Corporation, libelant, hereby appeals to the United States Court of Appeals for the Second Circuit from that part of the Final Decree herein dated June 27, 1951 which disallowed and dismissed the libel in all respects other than the amount of recovery allowed in the second paragraph thereof.

Dated New York, N. Y., the 13th day of September, 1951.

2334

Yours, etc.,

KIRLIN, CAMPBELL & KEATING,
Proctors for Libelant,
Office and P. O. Address,
120 Broadway,
New York 5, N. Y.

To:

IRVING H. SAYPOL,
United States Attorney,
Proctor for Respondent,
45 Broadway,
New York 6, N. Y.

The foregoing appeal is hereby allowed.

Dated New York, N. Y., the 13th day of September, 1951.

I. R. KAUFMAN,
U. S. D. J.

Libelant's Assignment of Errors.

2335

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware corporation,
Libelant,

against

UNITED STATES OF AMERICA,
Respondent.

Ad. 129-295.

2336

Calmar Steamship Corporation, libelant above named, hereby provisionally assigns error in the proceedings, decision, findings of fact, conclusions of law and decree of this Court herein in the event that the United States Court of Appeals for the Second Circuit shall not in all respects affirm an interlocutory decree entered on June 27, 1951, and a final decree entered on July 20, 1951 in an action in this Court entitled "Calmar Steamship Corporation, Libelant, against Sydney Keith Scott, one of Lloyds' underwriters, Edinburgh Assurance Company *et al.*, respondents", Docket No. Ad. 133-332, tried together with the case above entitled, from which an appeal has been taken by said respondents, as follows:

2337

1. In that this Court held that the United States of America is not liable to libelant herein for charter hire of SS. *Portmar* for the period beginning February 19, 1942 and ending at noon Eastern Australian Time, November 17 1942, inclusive.

2. In that this Court held that SS. *Portmar* did not sustain any loss or damage from any cause which

2338 *Libelant's Assignment of Errors.*

would render respondent United States of America liable therefor under the charter of SS. *Portmar.*

3. In that this Court failed to hold that respondent United States of America is liable by reason of breach of the provisions of the last paragraph of Article 2.17 of the charter of SS. *Portmar* to indemnify libelant as to any and all amounts not recoverable from respondent underwriters in said action, Docket No. 133-332, or allowed to said underwriters as an additional premium.

2339

4. In that this Court failed to hold that respondent United States of America is liable by reason of the provisions of Article 2.11 of the charter of SS. *Portmar* to indemnify libelant as to any and all liabilities or losses sustained by or with respect to SS. *Portmar* whatsoever arising from compliance with any orders or directions of respondent United States of America or its agents, given pursuant to any Article of said charter.

5. In that this Court failed to hold that the United States is liable to indemnify libelant against any loss

2340 due to vitiation or termination of the war risk insurance of SS. *Portmar* by reason of specific orders given to the Master of said vessel by any officer or agent of the United States of America.

6. In that this Court held that the plain purport and intendment of the insurance provisions of the charter between libelant and respondent United States of America was that libelant and its underwriters should assume all risks insured pursuant to such provisions and that respondent United States of America should not be liable under the charter for insured losses.

7. In that this Court failed to hold that respondent United States of America is liable to libelant

with respect to any and all losses due to or caused by compliance with, orders or directions of respondent United States of America or its agents, without regard to whether such losses or any part thereof were insured pursuant to the charter of SS. *Portmar*, or whether any insurance thereof existed at the time of loss.

8. In that this Court dismissed and disallowed the libel herein except as to recovery allowed by the decree herein.

2342

Dated, New York, October 18, 1951.

KIRLIN, CAMPBELL & KEATING,
Proctors for Calmar Steamship
Corporation, Libelant,
Office & P. O. Address,
120 Broadway,
New York 5, N. Y.

To:

WILLIAM V. CONNELL, Esq., Clerk,
United States District Court, 2343
Southern District of New York.

MYLES J. LANE, Esq.,
United States Attorney,
Proctor for Respondent,
45 Broadway,
New York 6, N. Y.

2344

Government's Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,

against

2345 UNITED STATES OF AMERICA,
Respondent.

Ad. 129-295

Sirs:

PLEASE TAKE NOTICE that the UNITED STATES OF AMERICA, respondent in the above entitled cause, hereby appeals to the United States Court of Appeals for the Second Circuit from that part of the final decree herein dated June 27, 1951, which awards the recovery to the libelant allowed in the second paragraph thereof.

Yours, etc.

2346

MYLES J. LANE,
United States Attorney,
Proctor for United States of America,
45 Broadway,
New York 6.

Dated, New York, N. Y., September 25, 1951.

To:

KIRLIN, CAMPBELL & KEATING, Esqs.,
Proctors for Libelant,
120 Broadway, New York 5.

WILLIAM V. CONNELL, Esq.,
Clerk for the United States District Court
for the Southern District of New York.

Order Allowing Government's Appeal. 2347

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK,

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,

against

UNITED STATES OF AMERICA,
Respondent.

Ad. 129-295

2348

United States of America, respondent in the above entitled cause, being aggrieved by the decision and order by the United States District Court for the Southern District of New York, heretofore filed herein, and by the decree entered thereon in the office of the Clerk of this Court on June 27, 1951, hereby prays that an appeal be allowed to the United States Court of Appeals for the Second Circuit.

Dated, New York, N. Y., September 25, 1951.

MYLES J. LANE,
United States Attorney,
Proctor for United States of America,
45 Broadway,
New York 6.

2349

Upon the foregoing petition, it is ORDERED that the appeal herein prayed for be and the same hereby is allowed.

JOHN W. CLANCY,
U. S. D. J.

Dated, New York, N. Y., September 25, 1951.

To:

KIRLIN, CAMPBELL & KEATING, Esqs.,
Proctors for Libelant,
120 Broadway, New York 5.

WILLIAM V. CONNELL, Esq.,
Clerk for the United States District Court
for the Southern District of New York.

2350

Government Assignment of Errors.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK,

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,
against
UNITED STATES OF AMERICA,
Respondent.

Ad. 129-295

2351

United States of America, respondent in the above entitled cause, hereby assigns error in the opinion, order and decree of the District Court for the Southern District of New York as follows:

1. In that the Court held that it had jurisdiction to award a decree against respondent, United States of America.

2352

2. In that the Court entered an order and final decree directing that libelant recover the cost of certain supplies and services furnished supercargoes aboard SS. *Portmar.*

Dated, New York, N. Y., September 25, 1951.

MYLES J. LANE,
United States Attorney,
Proctor for United States of America,
45 Broadway,
New York 6.

2353

Stipulation as to Exhibits.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,
against
UNITED STATES OF AMERICA,
Respondent.

Ad. 129-295

2354

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,
against
SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.

Ad. 133-332

2355

IT IS HEREBY STIPULATED AND AGREED by and between the proctors for the respective parties hereto

1. That the following exhibits, received in evidence on trial of the above entitled suits, need not be printed in the record on appeal, but shall be reprodneed and submitted in triplicate to the Court by appellants in Ad. 133-332 on the argument of the appeals with the same force and effect as if the same had been printed:

2356 *Stipulation as to Exhibits.*

LIBELANT'S EXHIBITS

Trial Exhibit No.	Description
7.	War risk insurance policy of Institute of London Underwriters' Companies on SS. *Portmar* in the sum of $116,000.
8.	War risk insurance policy of Excess Insurance Co., Ltd. on SS. *Portmar* in the sum of $30,000.
24.	Computation of charter hire of SS. *Portmar* from
2357	February 19, 1942 to November 17, 1942.
25.	List of expenses paid by Calmar Steamship Corporation.
27.	Profile plan of SS. *Portmar*.
29.	Chart of Harbor of Port Darwin with marks made by Captain Michelson.
30.	Receipt dated February 21, 1942 given to Captain Michelson for secret codes, by Australian Naval Authorities.
33.	Marine extended protest of Axel Michelson, Master, Joseph Bullock, Mate, John B. Cumber, Chief Engi-
2358	neer, Charles H. Mathews, Deck Engineer, and Eivind Steen, A. B., before United States Vice Consul at Melbourne, dated March 25, 1942.
35.	Captain Michelson's extended protest before Edward James Hamilton, Notary Public, dated March 27, 1942 at Melbourne, Australia.
48.	Captain Michelson's account of disbursements with vouchers annexed.
53.	Chart showing proposed voyage according to Naval Orders, and actual route taken by SS. *Portmar*.
54.	American Syndicate Schedule of War Risk rates, effective February 15, 1942.

UNITED STATES EXHIBITS

Trial Exhibit No.	Description
F.	Mr. C. B. Yule's estimate, dated October 26, 1950, of costs of repairs of SS. *Portmar* if made in the United States, to put the SS. *Portmar* back in class, based on his examination of libelant's exhibit 47.

RESPONDENT UNDERWRITERS' EXHIBITS

5.	In Exhibit 5, all enclosures except form of free of capture clause No. 3 (87A-56). 2360

2. That the following Exhibits, received in evidence on trial of the above entitled suits, shall be omitted from the printed record on appeal:

LIBELANT'S EXHIBITS

Trial Exhibit No.	Description
11.	Shipping Articles of SS. *Portmar*.
28.	Axel Michelson's Marine Note of Protest on January 22, 1942. 2361
32.	Axel Michelson's Marine Note of Protest before U. S. Vice Consul, dated March 23, 1942, at Melbourne, Australia.
34.	Axel Michelson's Marine Note of Protest before Edward James Hamilton, Notary Public, dated March 27, 1942, at Melbourne, Australia.
36.	Deck log book of SS. *Portmar*, November 20, 1941 to January 20, 1942, inclusive.
37.	Deck log book of SS. *Portmar*, January 21, 1942, to February 19, 1942, inclusive.
38.	Pages of Official Log of SS. *Portmar*, February 15, 1942, to February 19, 1942, inclusive.

2362 *Stipulation as to Exhibits.*

3. That any party may submit to the Court on argumen of the appeals herein, any exhibit received in evidence o the trial of the above entitled suits.

Dated New York, N. Y.
September 28th, 1951.

KIRLIN, CAMPBELL & KEATING,
Proctors for Libelant.

2363

MYLES J. LANE,

By EDWARD L. SMITH,
Proctor for Respondent,
United States of America.

MENDES & MOUNT,
Proctors for Respondents,
Scott, *et al.*

2364

Order for One Record on Appeals.

2365

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,

against

UNITED STATES OF AMERICA,
Respondent.

Ad. 129-295.

2366

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,

against

SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.

Ad. 133-332.

2367

IT IS HEREBY STIPULATED AND AGREED that only one record be printed and filed for the appeals in the above-entitled actions.

KIRLIN CAMPBELL & KEATING,
Proctors for Calmar Steamship Corporation.

IRVING H. SAYPOL,
EDWARD L. SMITH,
Proctor for United States of America.

MENDES & MOUNT,
Proctors for Respondents Scott, *et al.*

So Ordered: 25 August, 1951.

THOS. F. MURPHY,
U. S. D. J.

2368

Stipulation as to Record.

IT IS HEREBY STIPULATED AND AGREED by and between the proctors for the respective parties to the foregoing suits that the foregoing is a true transcript of the record of the said District Court in the above-entitled suits as agreed upon by the parties.

Dated: New York, December 10, 1951.

KIRLIN, CAMPBELL & KEATING,
Proctors for Calmar Steamship Corporation, Libelant.

2369

MYLES J. LANE,

By EDWARD L. SMITH,
Proctor for Respondent,
United States of America.

MENDES & MOUNT,
Proctors for Respondents,
Scott, *et al.*, Underwriters.

2370

Clerk's Certificate.

2371

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

I, WILLIAM V. CONNELL, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a true transcript of the record of the said District Court in the above-entitled causes as agreed upon by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York, this 12th day of December, 1951, and in the 176th year of the Independence of these United States.

2372

WILLIAM V. CONNELL,
Clerk.

(SEAL)

2373

[fol. 792] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1951

Nos. 184 and 185

Argued March 4, 1952 Decided May 12, 1952

Docket Nos. 22253 and 22254

CALMAR STEAMSHIP CORPORATION, Libellant-Appellee,

v.

SYDNEY KEITH SCOTT, et al., Respondents-Appellants

CALMAR STEAMSHIP CORPORATION, Libellant-Appellant,

v.

UNITED STATES OF AMERICA, Respondent-Appellee

Before: L. Hand, Augustus N. Hand and Chase, Circuit Judges

On appeals from decrees in the admiralty of the District Court for the Southern District of New York, (1) awarding damages to the libellant against underwriters for the loss [fol. 793] of its ship "Portmar" in Darwin Harbor, Australia, in February, 1942; and (2) dismissing a libel against the United States except for the victualing of two supercargoes on the same ship.

Edwin S. Murphy for the Calmar Steamship Corporation.

Walter B. Hall and Russell T. Mount for the respondent underwriters.

Edward L. Smith for the respondent, United States.

L. HAND, Circuit Judge:

I

The first of these suits was brought by the Calmar Steamship Corporation against Scott and others, underwriters upon a policy of marine insurance, covering the libellant's ship, "Portmar," for a voyage from a United States Pacific port to the Philippines and return to a U. S. Pacific or Atlantic port through the Canal. The meaning of the policy

is extremely difficult to grasp, owing to the confused and contradictory provisions in the "riders," which were attached to the ancient standard form of Lloyds, and which they completely superseded. We shall assume, however, that the labyrinth of verbiage, within which lurks whatever contract was made, is to be understood to agree that, although the ship might at the time be under the "restraint of princes," the policy should cover her loss, if that was occasioned by attacks of airplanes. We shall also assume that she became a "constructive total loss" through such attacks. These assumptions we may make because we hold [fol. 794] that the policy was no longer in force when the loss occurred, the insured voyage having before then come to an end and the policy with it. The "Portmar" left San Francisco on November 28, 1941, bound for Manila, laden with war supplies only. That was less than a fortnight before the Japanese attack upon Pearl Harbor on December 7th, of which the master heard by wireless on the same day, when he was 600 miles to the southwest of Hawaii. Fearing that he might encounter Japanese ships or planes if he kept on his prescribed course, he at once turned due south, awaiting further orders which he got on the 11th, and which directed him to go to Suva, Fiji Islands. That port he reached on the 20th, where he got further orders to go to Sydney, Australia, and he arrived at that port on the 30th. These, and all later, orders came either from American naval officers, or from Australian officers who had been given authority to act for American officers. By the time the ship reached Sydney, not only had war broken out between Japan and ourselves, and between Japan and Great Britain; but the Japanese had sunk the British ships "Repulse" and "Prince of Wales"; and the judge found that this, following, as it did, upon the substantial annihilation of our own fleet at Pearl Harbor, "gave the Japanese full battle fleet command of the Pacific" and a "naval superiority which enabled them to transport troops to almost any desired point * * * and establish it for an air-naval fueling base." On January 2nd the "Portmar" was ordered to go to Brisbane on the east Australian coast 529 miles north of Sydney, her cargo still unbroken, and there she berthed on the 5th. She at once received orders that her cargo "was to be discharged, sorted and part of it reloaded, together

with other cargo"; and on the 9th she left Brisbane under orders to report at Port Darwin, about 2100 miles distant, where she arrived on January 19th, after being for a part [fol. 795] of the time under the escort of Australian corvettes. Here all her cargo—both what was left of that lifted in California and what was lifted at Brisbane—was discharged except 1500 drums of high octane gasoline, which she was directed to deliver at the nearby port of Wyndham, together with 500 drums, which she had carried to Port Darwin, and which had been discharged but reloaded. On her return—apparently light—from Wyndham to Port Darwin, she was laded with another military cargo—including field pieces, a naval launch and ammunition—to reinforce the defence of Koepang across the Timor Sea, north of Australia. With this cargo and a contingent of troops on board she set out on February 15; but when 250 miles out she was on the next day attacked by Japanese planes, and was ordered back to Port Darwin where she arrived on the 18th. While in the roads awaiting a berth to discharge, she was attacked on the 19th by swarms of Japanese planes and through "near misses" and gunfire suffered injuries that eventually forced her master to beach her, and, as the libellant asserts, made her a "constructive total loss."

Even though we take all the other issues in the libellant's favor, the crucial question remains whether the dominion asserted over the "Portmar" by the American and Australian military authorities beginning at Brisbane had before February 19th put an end to the possibility of that return voyage for which alone the underwriters meant to insure her. From the time she was taken over at that port on January 5th until she was riddled by gunfire on February 19th, she had been under the absolute control of military authorities; no dominion could be more complete than, after discharging all but a small part of her outbound cargo at Brisbane and Port Darwin, to lade her with a partially new cargo, order her to Wyndham, fetch her back to Port Darwin, and set her out again as part of the military expedition to Koepang, upon so dangerous a mission that the com- [fol. 796] mander of the cruiser which was to act as an escort, told her that he would not risk his ship in the harbor of Koepang. The extent of this dominion being so comprehensive and absolute, the only question is as to its prospec-

tive duration. Was it certain to last beyond any period which the underwriters assumed that the return voyage would take; or if it is impossible to be "certain," was it for practical purposes beyond reasonable doubt that it would? That depended upon the condition of affairs in Australia during January and February, 1942. The testimony is uncontradicted that everyone responsible for the defence of that continent believed that its northern coasts at any rate were in the direct straits, and that the shortage of shipping was one of the most pressing dangers. Until the naval battle of the Coral Sea which was in May the Japanese carriers could range about unobstructed; and Japanese forces might land where they would, substantially unopposed.

We might indeed take judicial notice of much of this; but it is not necessary to do so for the same conclusion is inescapable from the testimony. Those in charge of the defence of the country seized and held anything that would float throughout the rest of 1942, and perhaps longer. Plant, an American Colonel, arrived at Melbourne at the end of March, as "Chief of War Transportation in the Southwest Pacific area, to organize and to operate water transportation down there." Immediate invasion of the northern part of the continent was threatened; the navy had abandoned Port Darwin; even the east coast down to Brisbane had been ordered evacuated. The army and navy took control of "every vessel we could get our hands on." There were not many, because Great Britain "had drawn practically all coastal ships from Australia," whose "life depends upon coastal shipping and they were desperate for covering their own needs, so we"—the military—"had very few [fol. 797] Australian vessels we could depend upon. * * * We were looking around desperately for anything that was afloat or could be made to float," and Australia had few repair yards. It made no difference whether a vessel was owned or chartered by the U. S. or by anyone else; military considerations alone governed, commercial were disregarded.

The extremity of the need for ships is illustrated by what was done in this very instance. The "Portmar" for a week after the attack lay beached at some distance from Port Darwin, subject to a tidal rise and fall of 27 feet; most persons thought her worthless, indeed the libellant still

strenuously maintains that she was not worth her repairs. Stowed in her holds were a number of field pieces which were sorely needed and it was found possible to unlade and salve them. In the process the officer in charge came to believe that the hull also might be salved, since there appeared to be no structural damage beyond the openings made by the concussion of shells and by gunfire. Therefore, after the lower holes had been plugged at low tide, she was floated and brought back to Port Darwin when she was enough reconditioned to venture upon a trip back to Brisbane. The earlier part of this was infested with Japanese ships and planes, and the ship, in charge of a picked crew though not under her own power, had to lie concealed in some bight during the day and move only at night. Moreover, this required her to hug the coast, and very greatly increased the distance to be covered. At Brisbane she was repaired and was later put in drydock at Sydney. The total cost of the repairs was $91,000, to which should be added $55,000 for towage and $20,000 for salvage: $166,000 in all. When all was done, it did not restore her to "commercial operating condition"; "it was strictly a patch job"; it made her "perfectly seaworthy but without any thought of restoring" her "to commercial operating condition," [fol. 798] though enough to permit her "to be operated in Australian waters." The War Shipping Administration took title to her on November 17, 1942, and she made a few trips before she was torpedoed and sunk.

These facts seem to us to prove as well as practical affairs permit that when she was taken over at Brisbane it was practically certain that she would continue to be employed in military service for a period far extending beyond her return voyage, a period which in every probability would outlast the year and certainly would extend over six months. We do not forget that on January 19th the libellant learned from one, Freeze, a traffic manager of the U. S. Lines that Lavino & Company, who supplied the Bethlehem Steel Company with large amounts of ore, "was going to load a cargo of chrome ore at New Caledonia for discharge at Philadelphia." Freeze had been the agent of the Maritime Commission for the charter in suit, and it was from him that the libellant first learned that the "Portmar" had reached Australia. He said that the ship

would load on her return voyage the latter part of February, for discharge at Philadelphia about the middle of April. This testimony was hearsay, it is true, but the respondents did not object to it and it was admissible.* However, it proved at most no more than that the Maritime Commission on January 19th still meant the "Portmar" to complete the prescribed voyage by a return to the U. S.; and that was the day on which she had arrived at Port Darwin, a fortnight after she had reached Brisbane. There is no evidence that the Maritime Commission knew the uses to which the military authorities in Australia had already put [fol. 799] her and were intending to devote her. Nor is there any reason to suppose that if it had known, it would, or indeed could, have taken her out of the control of the military. The termination of the voyage depended upon the purposes of those who had power to direct her movements; their purposes alone counted in determining whether the insured risks still continued. While it is true that the "requisition for title" was not made until November, that indicated no more than that only then did they resolve to make their possession permanent. It did not indicate that they had not from the beginning meant to use her as long as their critical needs lasted, or that those needs would not continue throughout the year. The impending Japanese seizure of at least the whole north coast, whether it succeeded or not, would result in an emergency that would be anything but temporary.

The question is whether the policy survived the seizure. The case for the plaintiff can be put most plausibly as follows. It is true that in the "rider" marked "B.C.2" the underwriters agreed that the "restraint of princes" should excuse their undertaking, but to this they made some exceptions, among which were losses caused by "gunfire * * * or other implements of war." Granted that it is

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* *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U. S. 1, 9; *Diaz* v. *United States*, 223 U. S. 442, 450; *Kansas City Southern Ry.* v. *Albers Commission Co.*, 223 U. S. 573, 596; *Rowland* v. *St. Louis & San Francisco R. R. Co.*, 244 U. S. 106, 108; *Continental Oil Co.* v. *United States*, 184 Fed. (2) 802, 813 (C. A. 9).

necessary to find in the maze of documents outside "B.C.2" some added provision that the losses were "otherwise covered by this policy"; such a provision is to be found in the "rider" marked "F-300," which insures risks of "military or naval aircraft and/or other engines of war." Hence it appears that notwithstanding that she might at the time be under "restraint of princes," she was insured against exactly that kind of loss which she suffered. Having expressly so dealt with the subject of "restraints of princes," and having provided when they should excuse liability and when they should not, the underwriters may [fol. 800] not now argue that, although the loss was one of those which they had accepted, they are not liable because the "restraint" was of an especial kind: *i.e.*, one which had already caused a "frustration" of the voyage. If they had intended not to cover all "aircraft" losses which might occur during a "restraint of princes," they should have said which of such "restraints" they meant to exclude.

Although this has a literal plausibility, it overlooks the fundamental subject matter of the insurance: *i.e.*, the "Portmar" on the prescribed voyage. All provisions of the policy must be read with that limitation in mind; for they were all ancillary and implementary to that purpose. We do not forget that the policy contained the following exception: "Warranted free of any claim based upon loss of or frustration of the insured voyage or adventure caused by restraint of kings" etc. Neither party has argued that this applies to the loss of the ship; and in fact it does not, for it is limited to claims for losses of the voyage as such, not of the ship. Yet a possible argument might be made that this excuse of the underwriters in the case of a "loss of or frustration of the voyage or adventure" excluded all excuses for any other kind of loss arising from a "frustration" of the voyage, under the principle: *expressio unius, exclusio alterius.* That would be an illegitimate inference. The clause only excused a loss which had to occur while the policy was in force: *i.e.*, the policy would not have ended before the loss occurred; and the loss in question, as we shall show, occurred after it had ended.

We have found no decision under a marine policy which is certainly relevant, but there are two cases in our courts and one in England, where the question arose as to whether

the owner or the charterer was entitled to the ship's earnings after requisition, and the controlling considerations are relevant to those which should control here. We held [fol. 801] in *The Claveresk*, 264 Fed. Rep. 276, that the owner was entitled to the requisition hire even on a time charter which had still fourteen months to run and which contained a "restraint" clause, and the Fourth Circuit held the same in the case where the charter had over three years to run. *The Isle of Mull*, 278 Fed. Rep. 131. The House of Lords in the well known case of *F. A. Tamplin S.S. Co., Ld.* v. *Anglo-Mexican Petroleum Co., Ld.* (1916), 2 A. C. 397, discussed the situation more thoroughly than any other court has done, and, although the decision was in favor of the charterer by a three to two vote, the opinions—"speeches"—of three of the judges—the two dissenters and one of the majority—did not differ as to the proper principle, though one of them did as to its application to the facts. The charter had been for five years, of which nearly three remained when the Crown requisitioned the ship in December, 1914, only a few months after the outbreak of the war. Lord Parker of Waddington and the Lord Chancellor, Lord Buckmaster, did indeed hold that, even though it had been proved,—which they thought it had not—that the requisition would in all probability extend beyond the remainder of the term, the interruption was covered by the "restraint clause"—because a time charter is not a contract for a specific venture, but for any uses to which the charterer may order the ship to be put. Apparently, they would have held for the charterer in any event. The other three, Lord Loreburn, Lord Haldane and Lord Atkinson, held that, if the interruption were reasonably likely to exceed the term, the stipulated venture—though a time charter—had come to an end. Lord Loreburn, however, thought that in fact the requisition might turn out to be only an interruption, and, if so, that it was within the "restraint" clause, while Lord Haldane and Lord Atkinson thought that the prospective duration of the requisition was too indefinite to be classed as an inter-
[fol. 802] ruption. The point upon which all agreed is that, had the case involved a voyage charter, the owner would have succeeded, provided it was reasonably sure that the requisition would extend beyond the limit of the pro-

posed voyage. In *Texas Company* v. *Hogarth Shipping Co.*, 256 U. S. 619, the charterer in a voyage charter sued for damages because the ship was requisitioned, but was defeated because the requisition had "frustrated" the venture: *i.e.*, the continued availability of the ship to the charterer. However, since there appears to have been no "restraint" clause, the point now at bar was not involved. In *"The Kronprinzessin Cecilie,"* 244 U. S. 12, a shipper sued the ship for failure to perform a bill of lading which did contain a "restraint" clause. The main contention was that in fact there had been no "restraint," but the court did not find it necessary to pass on this, because the presence of the "restraint" clause did not forbid the inference of an implied condition that the ship need not expose herself to capture. In all such cases the prospective length of the interruption on which the putative "frustration" depends, must be decided by the situation as it appears at the time of the interruption.*

It appears from the foregoing decisions that in a time charter, not only does a "restraint" clause not extend the prescribed period, but that if the "restraint" is likely to last beyond the term, it presently puts an end to the charter. Logically it might be thought not to do so, at least so long as the ship was put to uses to which the charterer might have put her. In such cases, if the charterer was content with the requisition hire, there would seem to be no objection to allowing him to receive it, provided he paid the charter [fol. 803] hire.** Other considerations apply to the case of a voyage charter, in which the charterer becomes entitled only to direct the services of the ship between the *termini* prescribed, and within the period customary in such cases. When such a charter contains no "restraint" clause, it is hard to see how any "restraint," involving as it must a deviation, can fail to "frustrate" the venture, unless it is trifling. When the charter does contain a "restraint"

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* *Borup* v. *Western Operating Corp.*, 130 Fed. (2) 381 (C. A. 2); *Jackson* v. *Union Marine Insurance Co.*, L. R. 10 C. P. 125.

** *Earn Line S. S. Co.* v. *Sutherland S. S. Co.*, 254 Fed. Rep. 126, 131, 132.

clause, it must however excuse some deviations from the limits, prescribed both in time and route; but it is not clear just how extensive these may be, except that they should not postpone the completion of the voyage to a time when the purposes of the "venture" have ended, commercially speaking, even though, physically speaking, the ship may still complete the voyage. A policy, upon a voyage charter must be understood to be coextensive with the voyage, and the "restraint" clause should be construed as it would between the owner and the charterer. Of course the underwriter does accept some extension of his liability upon such risks as he continues to assume pending the "restraint"; but he should not be taken to accept extensions that, commercially speaking, put an end to—"frustrate"—the venture as the parties contemplated it. It is obviously impossible to lay down in general terms what such extensions will be; each case must depend upon its circumstances, but it is clear that the importance of the extension will depend, not only upon its length, but upon the changes in the risks to which the new employment of the ship will expose her while it lasts. In the case at bar the requisition added so notably to the risks of the prescribed voyage that the voyage ceased to be the same. In the first place, although the round voyage was expected to be from the end of November to the middle of April—less [fol. 804] than five months—the duration of the requisition at the very shortest estimate would have been twice that length, and probably more nearly three times as much. But that was not the only change which it effected in the risks, though it would really have been enough to put an end to the policy. A round voyage from San Francisco to Australia and Philadelphia was one thing; and it was a very different thing to an underwriter from the same voyage, broken by an interlude of six months or more of hovering about the coasts of Australia in the year 1942, exposed to the continuous and unimpeded attacks of Japanese planes and naval vessels, especially should the ship chance to be used, not only to carry materials for defence, but as a transport. It seems to us that so much to deviate from the prescribed voyage was to substitute a quite different voyage and that the change may not justly be regarded as provided for by the conventional clause providing for a "restraint of princes." We are not referred to any decision which has

held that that clause permits so wide a departure from the subject matter of the policy. As in all such cases, we must interpret the written words by trying to place ourselves in the position of the parties, had they been faced in advance with the actual event: the seizure at Brisbane. After making every allowance for the *canon contra proferentem* and its especial application to an insurer, we cannot believe that they would have agreed that the clause so far transmuted the undertaking. We hold that the voyage ended at Brisbane and that the policy then ceased to cover the ship.

Decree reversed; libel dismissed.

II

It remains to consider the suit of the libellant against The United States. If the charterer had so wished, the ship [fol. 805] might have been employed either in "foreign commerce," or to carry "commodities essential to the national defence"; but, according to the finding, she lifted only "high octane gasoline in drums * * * at Oakland, California, and military equipment, supplies and ammunition * * * at San Francisco," all en route for Manila. The gasoline was concededly destined for war planes, so that in fact she was used to carry nothing but "commodities essential to the national defence": i.e. war material; and it is abundantly established that such a ship, while so employed, is not "employed as a merchant vessel." In the *Western Maid*, 257 U. S. 419 the Supreme Court considered the immunity from lien of collision of three ships, of which the "Western Maid" was one. She was owned by the U. S. and had been employed as a transport, but at the time of the collision she was "loaded with foodstuffs for the relief of the civilian population of Europe." In answer to the assertion by the U. S. of its sovereign immunity the libellant "suggested" that she "was a merchant vessel," which the court answered by saying (p. 432) that "she was engaged in a public service that was one of the constituents of our activity in the war and its sequel and had no more to do with ordinary merchandizing than if she had carried a regiment of troops." Although the collision had occurred before the passage of the Suits in Admiralty Act, it was after that of the "Shipping Act, 1916,"* § 9 of which made all vessels "purchased,

* 39 Stat at L., pp. 728-738.

chartered or leased from the Board * * * while employed solely as merchant vessels * * * subject to all laws, regulations and liabilities governing merchant vessels." Thus, substantially the identical words in a substantially identical context were involved, and the "Portmar", was certainly not "employed as a merchant vessel" during the period [fol. 806] here involved. We decided the same point in *Bradey* v. *United States*, 151 Fed. (2) 742, as did Judge Ward in the *Norman Bridge*, 290 Fed. Rep. 575 and Judge Augustus N. Hand in *United States* v. *City of New York*, 8 Fed. (2) 270; and the Supreme Court at least recognized the doctrine again in *U. S. Grain Corporation* v. *Phillips*, 261 U. S. 106, 111. That ends any possibility of basing the libel upon the Suits in Admiralty Act,"* because that act annexes as a condition to the consent of the U. S. to be sued that the vessel as to which the claim arises shall be "employed as a merchant vessel." This appears from the following analysis the first two sections of the act. Section 2 gives such a consent "in cases where if such vessel were privately owned or operated," the claimant might sue in the admiralty. "Such vessel" refers back to § 1 which describes the vessels which shall be exempt from "arrest and seizure" as those which the U. S. "shall own," or which shall be in its "possession," or which shall be "operated by or for" it. It is obvious that a vessel under a voyage charter to the United States is operated "for" the United States—indeed, were it not so, "for" would be redundant. Hence the condition that the vessel shall be a "merchant" vessel attaches to a vessel under a voyage charter.

We cannot understand what is the significance of the fact that the "Portmar" was not a "public vessel" and that no suit would lie under the "Public Vessels Act,"** unless the argument be that, if there be no relief under either the Suits in Admiralty Act or the Public Vessels Act, we should assume that a suit will lie for the *casus omissus*. In the first place it has not been decided that the libellant has no relief in the Court of Claims; and, even though it does not,

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* §§ 741, 742, Title 46, U. S. C.

** §§ 781, 782, Title 46, U. S. C.

[fol. 807] certainly we may not imply a consent by the United States to be sued when it has not expressly agreed.

The decree for $238.50 presents a theoretical difficulty. The libel asked for damages upon three claims: the first, for hire; the second, for failure to insure; the third, for exposing the "Portmar" to enemy attack. We are not clear under which of these the claim for victualling the supercargoes should fall. Moreover, we do not find it necessary to decide whether, if it can be regarded as a separate claim, the District Court had jurisdiction to decide it under the Tucker Act. It was not so pleaded, nor has the libellant suggested anything of the sort. We hold that it was part of the larger claim, and that as such the District Court had no jurisdiction over it.

Decree reversed and libel dismissed for lack of jurisdiction.

[fol. 808] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of May one thousand nine hundred and fifty-two.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

CALMAR STEAMSHIP CORP., Libellant-Appellant,

v.

UNITED STATES, Respondent-Appellant

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court

be and it hereby is reversed and libel dismissed for lack of jurisdiction in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) Alexander M. Bell, Clerk.

[fol. 809] [Endorsed:] United States Court of Appeals for the Second Circuit. Calmar Steamship Corp. v. United States. Judgment. United States Court of Appeals, Second Circuit. Filed May 12, 1952. Alexander M. Bell. Clerk.

[fol. 810] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of May one thousand nine hundred and fifty-two.

Present: ——, ——, ——, Circuit Judges

CALMAR STEAMSHIP CORP., Libel-ant-Appellee,

v.

SYDNEY KEITH SCOTT, et al., Respondents-Appellants

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) Alexander M. Bell, Clerk.

[fol. 811] [Endorsed:] United States Court of Appeals for the Second Circuit. Calmar Steamship Corp. v. Sydney Keith Scott, et al. Judgment. United States Court of Appeals, Second Circuit: Filed May 12, 1952. Alexander M. Bell, Clerk.

United States Court of Appeals

FOR THE SECOND CIRCUIT.

No. 185 - October Term, 1951.

CALMAR STEAMSHIP CORPORATION,
Libelant-Appellee,

against

Ad: 133-332.

SYDNEY KEITH SCOTT, *et al.*,
Respondents-Appellants.

PETITION OF CALMAR STEAMSHIP CORPORATION FOR REHEARING.

KIRLIN CAMPBELL & KEATING,
Proctors for Calmar Steamship Corporation, Appellee.

EDWIN S. MURPHY,
IRA A. CAMPBELL,
HELEN C. CUNNINGHAM,
Counsel.

CAMPBELL CASE 1952 SECOND CIRCUIT

United States Court of Appeals

FOR THE SECOND CIRCUIT.

No. 185 - October Term, 1951.

CALMAR STEAMSHIP CORPORATION,
Libelant-Appellee,

against

Ad. 133-332.

SYDNEY KEITH SCOTT, *et al.*,
Respondents-Appellants.

PETITION OF CALMAR STEAMSHIP CORPORATION FOR REHEARING.

The libelant-appellee, Calmar Steamship Corporation, respectfully petitions for a rehearing and reconsideration of this Court's decision of May 12, 1952 in the above entitled case. As hereinafter shown, the decision is founded on assumptions of fact which could not have been made unless the Court had overlooked certain facts of record not mentioned in the opinion; and because the decision misconstrues a common form of marine insurance policy in such a manner as to deprive the assured of protection in a contingency expressly provided for in the policy.

SUMMARY OF THE GROUNDS FOR THIS PETITION.

This Court reversed the District Court's decree which had awarded libelant recovery against the respondent war risk underwriters for the loss of libelant's steamer *Portmar* on February 19, 1942, at Port Darwin, Australia, as the result of bombs and gunfire from Japanese aircraft.

The basic ground of the decision was that respondents' "policy was no longer in force when the loss occurred, the insured voyage having before then come to an end and the policy with it. * * * We hold that the voyage ended at Brisbane [January 5-9, 1942] and that the policy then

ceased to cover the ship." *Slip Opinion*, pages 1175 and 1185.

The foregoing holding was expressly based upon two subsidiary propositions of fact which were erroneously assumed by the Court. Those propositions were:

I. That respondents' policy merely insured the *Portmar* "for a voyage from a U. S. Pacific port to the Philippines and return to a U. S. Pacific or Atlantic port through the Canal" and that such voyage was "frustrated" at Brisbane by the military orders which sent the *Portmar* to northern Australia.

The record shows, however: (A) that an express agreement was made between underwriters and libelant as of February 6, 1942, extending the policy to cover the vessel during its diversion to Australia on the outward voyage under government orders; and (B) that the policy *when issued* contained an express provision that the vessel should be:

> "Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required."

II. That the requisition at Brisbane "frustrated" and terminated the insured voyage because "A policy, upon a voyage charter must be understood to be coextensive with the voyage, and the 'restraint' clause should be construed as it would between the owner and the charterer," and because "the underwriter * * * should not be taken to accept extensions that, commercially speaking, put an end to—'frustrate'—the venture as the parties contemplated it." *Slip Opinion*, page 1184.

The record shows, however: that there was no frustration or termination of the charter at Brisbane

because the charter expressly provided, by Article 2.27, for its continuance, notwithstanding that orders might be given by any government changing the voyage, and because our government, as charterer, continued to pay the charter hire up to the time when the vessel became a constructive total loss on February 19, 1942.

In short, the decision assumes that the contingencies which occurred were not within the contemplation of the parties to the charter or the insurance policy, whereas the record clearly shows that such contingencies were expressly provided for in both documents.

The libelant did everything that a prudent shipowner could do to place war risk insurance which would be coextensive with the time and area of the vessel's employment under the time charter, by insuring the vessel not only for the voyage specifically described in the charter, but also in the event of deviation from or change of that voyage.

The foregoing points will be fully shown in the points of argument which follow.

I.

THE UNDERWRITERS' AGREEMENT OF FEBRUARY 6, 1942 AND THE "HELD COVERED" CLAUSE OF THE POLICY BOTH NECESSITATE RECONSIDERATION OF THIS COURT'S HOLDING THAT THE POLICY CEASED TO COVER THE *Portmar* WHILE AT BRISBANE JANUARY 5TH-9TH, 1942.

a. The Agreement of February 6, 1942.

On January 24, 1942 Mather & Co., Philadelphia, Calmar's brokers, sent a cable message to their correspondents in London, Thos. Stephens & Sons, Ltd., as follows:

* * *

"PORTMAR DIVERTED TO AUSTRALIA ON OUTWARD VOYAGE UNDER GOVERNMENT ORDERS. STOP HOLD COVERED PENDING FURTHER ADVICES

MATHER CO"

The foregoing cable was submitted by Messrs. Stephens to the underwriters and was initialled by each of them during the period January 26-February 6, 1942.

Record, fols. 1756-1758.

On February 6, 1942 Thos. Stephens & Sons, Ltd. wrote to Mather & Co. a letter dated February 6, 1942, as follows:

"THOS. STEPHENS & SONS, LTD.
Insurance Brokers,
52, Cornhill, E. C. 3.
and at Lloyd's, E. C. 3.

London, 6th February, 1942.

Dear Sirs,

Calmar S/S Corporation,
Portmar /S/ Hull War Risk Insurance.

We have your cable of the 24th January last, advising that this vessel insured for the voyages from U. S. Pacific ports to the Philippines and return to U. S. has been diverted to Australia on the outward voyage under Government orders.

We confirm that all Underwriters on our War Risk Policy have agreed to hold this diversion covered pending your further advices.

Yours truly,

THOS. STEPHENS & SONS, LTD.

H. STEPHENS,
Director."

HS/OD

Record, fols. 1777-1779.

The District Court made the following finding of fact:

"(45) On January 22, 1942, Calmar Steamship Corporation received a teletype message from its San Francisco office stating that the *Portmar* was in Australia. On January 24, 1942, Calmar Steamship Corporation assuming that the *Portmar* had gone to Australia under government orders, notified the war risk underwriters that the *Portmar* had been diverted to Australia on outward voyage under Government orders and requested that the vessel be held covered pending further advices. All the underwriters agreed, and this was confirmed by letter from Thos. Stephens & Sons, Ltd., of February 6, 1942 to Nather & Co. reading: 'We have your cable of the 24th January last advising that this vessel insured for the voyages from U. S. Pacific ports to the Philippines and return to U. S. has been diverted to Australia on the outward voyage under Government orders. We confirm that all Underwriters on our War Risk Policy have agreed to hold this diversion covered pending your further advices.'"

Record, fols. 2159-2160.

All the above facts were referred to on pages 8 and 32 of our main brief.

No further information as to the movements of the vessel was received by Calmar until after the disaster.

On February 19, 1942 (New York date) Calmar received a letter from the Maritime Commission to the effect that the *Portmar* arrived at Darwin on February 12, 1942. Groom, Record, fols. 435-436. The enemy attack on the *Portmar* had already occurred (Australian date). The next word came on February 23, 1942 when I. M. Holt of the War Shipping Administration telegraphed Calmar that the *Portmar* had been reported through British channels to have been damaged in an air raid at Port Darwin. *89th Finding of Fact;* Record, fol. 2200. Thus no "further advices" could be given by Calmar to the underwriters before the loss.

This Court has repeatedly held that findings of fact by the Trial Judge will not be disturbed when they are supported by the evidence. The above findings were founded on uncontroverted evidence.

It seems manifest that this Court erred in holding that the insurance terminated on January 5, 1942, overlooking the fact that by express agreement it was continued, or reinstated, when the underwriters on February 6, 1942 agreed to the request contained in Mather's cable of January 24, 1942.

The decision of this Court, without giving any effect whatever to that agreement,* holds that Calmar was stripped of its war risk insurance by events which were beyond its control, consent and knowledge, and that after January 5, 1942 it was uninsured against the disaster that occurred on February 19, 1942 even though the underwriters had agreed on February 6, 1942 that the vessel would be held covered "pending further advices".

Thus, if the decision of this Court on May 12, 1952 remains unchanged, Calmar was subjected to as vicious an entrapment as could be imagined. The shipowner, having no knowledge of the extent of the military controls in Australia, sought confirmation of its insurance. The underwriters, being expressly informed by Mather's cable message that the *Portmar* was "diverted to Australia on outward voyage under government orders," nevertheless agreed to hold the vessel covered. If the underwriters had notified Calmar that they refused to "hold covered", Calmar would have had a chance to obtain other insurance. As the underwriters did not decline Calmar's request, Calmar assumed that the request was granted, as indeed it actually was. If there ever was a case for estoppel, this is it. This Court should not countenance the underwriters' contention that they were discharged from liability under the policies by a restraint which occurred on January 5, 1942, in view of the fact that on or about February 6, 1942 they agreed to hold the vessel covered.

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* *Record*, fols. 470-471; 2152-2153, 2154, 2156, 2161.

b. The "Held Covered" Clause of the original policies.

Apart from the foregoing, the decision of this Court did not even refer to the fact that, *when issued,* the policies in suit contained a "Held Covered" clause as follows:

> "Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required."

Policies, Libelant's Exhibits 6, 7 and 8; *14th Finding of Fact, Record,* fols. 2141-2142.

The "Held Covered" clause was quoted in our main brief at page 5 and discussed at page 32.

The obvious purpose of the "Held Covered" clause is to prevent the termination of insurance protection even in cases where the vessel may have *voluntarily* departed from the limits of the voyage specifically described in the policy.

The uncertainties arising under war conditions are among the very contingencies contemplated by the clause. The recent 3rd Edition of Winter on "Marine Insurance," contains the following statement at page 162:

> "* * * During the following World War II the usual channels of overseas commerce were so congested, and in many cases so disrupted, that the Institute warehouse-to-warehouse clause left the merchant in a very difficult position. It was not possible for him to know or to find out whether his shipments were proceeding to their destination in an orderly manner or were being subjected to unusual delays or being forwarded over unusual routes. To assure the merchant that his shipment would continue to be covered notwithstanding such interruptions, underwriters agreed, for an additional premium, to protect the shipment during such interruptions under the terms

of the following *marine extension clauses*. Often the rate charged for this additional protection was much greater than the basic rate charged for normal transits."

Again at page 169 Mr. Winter states (after quoting a "Held Covered" clause):

"* * * As deviation in the case of time hull insurance would automatically void the policy for the remainder of the policy term, a deviation clause similar to that in cargo policies is inserted, * * *."

We have never contended that these policies were continued in effect solely by virtue of the "Held Covered" clause, because that clause has been held necessary only in the event of *voluntary* deviation or *voluntary* change of voyage. It has been held to be unnecessary where the deviation or change of voyage is *involuntary* on the part of the assured. *Rickards et al.*, v. *Forrestal etc., Co.*, [1942] A. C. 50, 82-83, 109-110.

But if, as the cases hold, the "Held Covered" clause was designed to protect the assured and continue the insurance in effect where deviation or change of voyage occurs *with the consent* of the assured, *a fortiori* the insurance should be held to continue in effect in a deviation or change of voyage *without the consent or control* of the assured, or the Master of the vessel. And even though it were held that the underwriters are entitled to an additional premium herein, under the "Held Covered" clause, such premium should not exceed 6½%. It was proved that the American Marine Insurance Syndicate on February 15, 1952 promulgated a war risk insurance rate of 6½% for voyages from U. S. Pacific to Australian Ports and return. *Libelant's Exhibit* 54, Record, fols. 1967-1968; *Grotefend*, Record, fols. 794-795.

The effect of the "Held Covered" clause, the sections of the British Marine Insurance Act, 1906 which deal with deviation and change of voyage, and the authorities on that

subject, are discussed in *Arnould on Marine Insurance*, 13th Ed. Vol. 1, Sections 376-390.

We respectfully submit that this Court's holding "that the voyage ended at Brisbane and that the policy then ceased to cover the ship" (*Slip Opinion*, page 1185) is wholly incompatible with the express provisions of the "Held Covered" clause.

II.

THIS COURT'S HOLDING THAT, BY REASON OF THE *Portmar's* COMPLIANCE WITH MILITARY ORDERS, THERE WAS A "FRUSTRATION" OF THE VOYAGE CONTEMPLATED IN THE *Portmar's* CHARTER AND POLICY, IS DIRECTLY CONTRARY TO THE DOCUMENTARY FACTS.

a. The charter contemplated military interference during the term of the charter.

It may be granted that the policy on the *Portmar* "must be understood to be coextensive with the voyage, and the 'restraint' clause should be construed as it would between the owner and the charterer. * * *" (*Slip Opinion*, p. 1184). But "the venture as the parties contemplated it" was not, as the Court seems to have assumed, merely the voyage described in Article 1.01 of the charter, "for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports". *Charter*, Record, fol. 57.

This single provision must be read not only with due regard to the other provisions of the charter, but also to the historical facts and the known condition of tension in the relations between this country and Japan at the time the charter was made and the insurance was placed.

The contractual context and historical background show that the parties contemplated the possibilities of extensive changes from the voyage specifically described in Article

1.01. The charter itself is replete with provisions showing a clear contemplation of military interference with the vessel's employment.

In Article 2.04 it is provided that in the event of accident or damage to the vessel, hire should not cease because of "the happening of any event * * * caused or contributed to by war or warlike acts * * * * navigating (contrary to peacetime custom) under the direction of naval, military, Coast Guard, or other governmental authorities, * * *". *Charter*, Record, fols. 71-72.

Article 2.15 provides that all bills of lading issued under the charter should contain certain clauses including "*War Clauses*", in part as follows: (italics ours)

> "* * * The carrier, master and ship shall have liberty to comply with any orders or directions as to loading, departure, arrival, *routes, ports of call, stoppages, discharge, destination, delivery or otherwise* howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions. *Delivery or other disposition of the goods in accordance with such orders or directions shall be a fulfillment of the contract voyage.* The ship may carry contraband, explosives, munitions, warlike stores, hazardous cargo, and may sail armed or unarmed and with or without convoy." *Charter*, Record, fols. 99-100.

Article 2.16, the general exceptions clause, provides as follows:

> "* * * And neither the Vessel, her master or Owner nor the Charterer, shall, unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from: * * * act of war; act of public enemies, * * * arrest or restraint of princes, rulers or people, * * * No exemption afforded to the Charterer under this Article shall diminish its obligations for hire under the other

provisions of this Charter." *Charter*, Record, fols. 102-103.

Article 2.17 states:

> "The Owner may provide, and the Charterer shall pay for, * * *
>
> (i) insurance on the Vessel, which shall be made payable to the Owner, in the amount specified in Article 1.03, under full form of American Institute of Marine Underwriters' war risk policies, including malicious damage, sabotage, strikes, riots and civil commotion, valued at the amount insured * * *
>
> The Vessel shall not be required to sail on any voyage until the insurance contemplated by this Article has been placed by the Owner * * *" *Charter*, Record, fols. 104-105.

Article 2.27 of the charter provides in part as follows: (italics ours)

> "ARTICLE 2.27. The Master and the Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions, *and if by reason of or in compliance with any such orders or directions anything is done or is not done, such shall not be deemed a deviation* or breach of orders or neglect of duty by the Master or the Vessel; * * *" *Charter*, Record, fol. 111.

Nothing could be clearer from the foregoing express provisions of the charter than that almost every conceivable contingency of military interference was expressly contemplated and provided for as being within the charter voyage.

Article 2.03 of the charter specifically required the charterer to "pay hire for the use of the vessel * * *

beginning with the time of her delivery, and continuing until the time of her redelivery in like good order and condition, * * * to the owner at the port of redelivery specified in Article 1.04 (a U. S. North Atlantic port), or if the Vessel shall be lost, until the time of her loss * * *; or in the case of a constructive total loss, to the time of the casualty resulting in such constructive total loss, * * *".

Furthermore, the uncontroverted fact is that the United States Maritime Commission, as charterer, paid the charter hire to the libelant up to the time of the loss of the vessel at Port Darwin on February 19, 1942. *Groom*, Record, fols. 453-457.

The 123rd Finding of Fact by the Trial Court contained the following statement:

> "* * * Charter hire in full was paid the owner of the SS. *Portmar* pursuant to a charter party up to the time of the Japanese attack upon her February 19, 1942; * * *" *Record*, fol. 2224-2225.

The decision of this Court that the charter was frustrated ignores two important facts: (1) that the events which occurred were contemplated in the charter provisions; and (2) that the parties to the charter, by their actual conduct, showed that they regarded it as still in force up to the time of the loss of the vessel.

b. The risks of the prescribed voyage were not increased.

One further assumption in this Court's opinion also seems directly contrary to the facts of record. It is stated by the Court that "in the case at bar the requisition added *so notably to the risks of the prescribed voyage* that the voyage ceased to be the same." *Slip Opinion*, page 1184 (italics ours).

The very reason for the diversion of the *Portmar* from her prescribed voyage to the Philippine Islands was the outbreak of war between Japan and the United States on December 7, 1941. Under the actual conditions of Japanese control of the sea it was virtually certain that the vessel

would have become a toal loss if she had proceeded on the prescribed voyage.

Under those undeniable circumstances there is no factual basis for the Court's holding that the diversion of the vessel to Australia or the uses to which she was put in Australia were in any way more dangerous than the certainty of total loss if the vessel had continued on the "prescribed voyage".

Conclusion.

We therefore respectfully submit that the decision of this Court dated May 12, 1952 in Ad. 133-332 should be reconsidered in the light of the above facts and contentions, and that a rehearing for that purpose should be granted.

Dated May 23, 1952.

Respectfully submitted,

Kirlin, Campbell & Keating,
Proctors for Calmar Steamship
Corporation, Appellee.

Edwin S. Murphy,
Ira A. Campbell,
Helen C. Cunningham,
Counsel.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

Edwin S. Murphy

[fol. 826] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CALMAR STEAMSHIP CORPORATION, Libellant-Appellee,

against

SYDNEY KEITH SCOTT, et al., Respondents-Appellants

Before L. Hand, Augustus N. Hand and Chase, Circuit Judges

Petition of Calmar Steamship Corporation for rehearing

Kirlin Campbell & Keating, Proctors for petitioner.

Per Curiam: Petition denied.

A. N. H., H. B. C.

Filed June 6, 1952.

[fol. 827] [Endorsed:] United States Court of Appeals, Second Circuit. Filed June 6, 1952. Alexander M. Bell, Clerk.

[fol. 828] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 6th day of June, one thousand nine hundred and fifty-two.

Present: Hon. Learned Hand, Hon. Augustus N. Hand,
Hon. Harrie B. Chase, Circuit Judges

CALMAR STEAMSHIP CORPORATION, Libellant-Appellee,

v.

SYDNEY KEITH SCOTT, et al., Respondents-Appellants

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

[fol. 829] [Endorsed:] United States Court of Appeals, Second Circuit. Calmar Steamship Corp. v. Sydney Keith Scott, et al. Order. United States Court of Appeals, Second Circuit. Filed June 6, 1952. Alexander M. Bell, Clerk.

[fol. 830] Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 262

CALMAR STEAMSHIP CORPORATION, Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed October 20, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 303

CALMAR STEAMSHIP CORPORATION, Petitioner,

vs.

SYDNEY KEITH SCOTT, One of the Lloyds Underwriters, et al.

ORDER ALLOWING CERTIORARI—Filed October 20, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

judgment of the United States Court of Appeals for the Second Circuit dated May 12, 1952 in the above entitled case.*

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is not yet officially reported. It appears at pages 792-802 of the record. The endorsement and order dated June 6, 1952, denying the petition for rehearing filed May 23, 1952 will be found at pages 820-821 of the record.

The decision of the United States District Court for the Southern District of New York is reported in 103 F. Supp. 243, and appears at pages 700-756 of the record.

Statement of the Matter Involved

This is a suit by Calmar Steamship Corporation, a Delaware corporation, owner of the American cargo steamship *Portmar*, against British war risk underwriters of the vessel for recovery of a constructive total loss under the policies of war risk insurance by reason of damage sustained by the vessel in Japanese aerial attacks in the Timor Sea on February 16, 1942, and at Port Darwin, Australia on February 19, 1942.

The libel herein was filed on November 15, 1944 in the United States District Court for the Southern District of New York.

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* This petition for writ of certiorari, and a petition for a writ of certiorari in the case of *Calmar Steamship Corporation* v. *United States of America*, October Term, 1952, No. 262, are presented to this Court on a single printed record. Both cases arose out of the same disaster. The latter is to some extent alternative to the present case. These cases were not consolidated, but were tried together, and decided in a single opinion by the District Court. R. 700-756. It was directed by the District Court that the appeals proceed on a single printed record. R. 789. The appeals were decided in a single opinion by the United States Court of Appeals for the Second Circuit. R. 792-804.

The first cause of action claims recovery of the full insured value, $860,000, as for constructive total loss of the *Portmar,* and for additional sue and labor and salvage expenses, all with interest. The second cause of action claims in the alternative for a partial loss.

The Charter.

As of November 21, 1941, petitioner chartered the *Portmar* to the United States Maritime Commission by a time charter for one round voyage described in Article 1.01 of the charter as from "* * * from United States. Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports."

The charter contained, among others, the provisions set forth in Appendix I.

The War Risk Insurance.

On November 26 and 27, 1941, pursuant to Articles 1.03 and 2.17 of the time charter of the *Portmar,* petitioner obtained war risk insurance on the hull and machinery of SS. *Portmar,* valued at $860,000, on a voyage described in the policies as follows:

> "at and from A UNITED STATES PACIFIC port to port or ports in the PHILIPPINES ISLANDS, whilst there and return to UNITED STATES PACIFIC port or UNITED STATES ATLANTIC port (Via Panama Canal), Via port or ports any order and for 24 hours after arrival."
>
> Exhibits 6, 7 and 8; R. 70-71, 598.

The insurance was placed through petitioner's brokers, Mather & Co. of Philadelphia, and their London correspondents, Thos. Stephens & Sons, Ltd. R. 143-144.

Petitioner informed the United States Maritime Commission of the kind and amount of the war risk insurance, and said policies of insurance were approved by the United States Maritime Commission R. 715.

Three policies were issued, that of Lloyds' underwriters in the sum of $714,000; another by seven English companies, members of the Institute of London Underwriters, in the total sum of $116,000; and the third by Excess Insurance Company, Ltd. in the sum of $30,000. R. 710-711.

Said policies insured the *Portmar* against "the risks of war" and "all consequences of hostilities or warlike operations," and contained the "Free of British Capture (B. C. 2)" rider, providing, in effect, that although the underwriters would not be liable for any claim arising from restraint, detainment or requisition, the policy nevertheless, as long as the vessel remained the property of the assured (was not "condemned"), would cover losses caused by gunfire, bombs, or other implements of war. These provisions among others of the policies, are set forth in Appendix II.

The Agreement of February 6, 1942.

As shall hereafter appear, after the Japanese attack on Pearl Harbor, the *Portmar*, while on a voyage across the Pacific, was diverted under sovereign military orders, without petitioner's knowledge or consent, to the Fiji Islands and thence to Australia. The *Portmar* arrived at Sydney, Australia on December 30, 1941 and was ordered thence to Brisbane, Australia where she arrived on January 5, 1942. On January 19, 1942, petitioner was first informed unofficially that the *Portmar* was "somewhere in Australia."

On January 24, 1942 after petitioner had received word from its San Francisco office that the *Portmar* was in Australia, petitioner caused Mather & Co. of Philadelphia to

send a cable message to Thos. Stephens & Sons, Ltd., as follows:

> "PORTMAR DIVERTED TO AUSTRALIA ON OUTWARD VOYAGE UNDER GOVERNMENT ORDERS. STOP HOLD COVERED PENDING FURTHER ADVICES.
>
> "MATHER CO."

Exhibit 4, R. 586.

That cable was received on January 26, 1942, was submitted by Messrs. Stephens to the underwriters and was initialed by each of them. R. 586.

On February 6, 1942 Thos. Stephens & Sons, Ltd. sent to Mather & Co. the following letter:

> "We have your cable of the 24th January last, advising that this vessel insured for the voyages from U. S. Pacific ports to the Philippines and return to U. S. has been diverted to Australia on the outward voyage under Government orders.
>
> "We confirm that all Underwriters on our War Risk Policy have agreed to hold this diversion covered pending your further advices.

Exhibit 5, R. 593.

The forty-fifth finding of fact made by the District Court, contained, among others, the following findings, R. 720 (italics ours):

> "* * * On January 24, 1942, Calmar Steamship Corporation assuming that the *Portmar* had gone to Australia under government orders, notified the war risk underwriters that the *Portmar* had been diverted to Australia on outward voyage under Government orders and requested that the vessel be held covered pending further advices. *All the underwriters agreed,* and this was confirmed by letter from Thomas Stephens & Sons, Ltd., of February 6, 1942 to Mather & Company, reading: * * *" (quoting the above letter).

The foregoing agreement of February 6, 1942 was one of the grounds for the petition for rehearing, filed on May 23, 1952, and denied on June 6, 1952. R. 806-818, 820-821.

The Voyage.

Prior to sailing on the voyage the Master received from the United States Navy secret written and oral orders as to the positions to be passed on the voyage. R. 715.

Pursuant to Article 1.01 of the charter, the *Portmar* sailed on November 28, 1941 from San Francisco for the Philippine Islands, with cargo of high octane gasoline in drums, military equipment and supplies shipped by the Government under Article 2.01 of said charter.

On December 7, 1941 at about 8 A. M. when the *Portmar* was then about six hundred miles southeast* of the Hawaiian Islands following the route laid down in the naval orders, the Master of the *Portmar* heard a radio report of the Japanese attack on Pearl Harbor. R. 716.

The Master thereupon, for the safety of his vessel, turned to a southerly course to avoid the islands and possible capture by the Japanese until further naval orders were received. R. 717.

On December 11, 1941 the Master received orders by radio from the Commandant, Twelfth U. S. Naval District, San Francisco, to proceed to Suva, Fiji Islands and there to receive further instructions from the British naval authorities. The Master of the *Portmar* obeyed said orders and proceeded to Suva, Fiji Islands, arriving there on December 20, 1941. R. 717.

Every move of the *Portmar* from the time she was ordered to Suva, until she was damaged by enemy attack

* The word "southwest" in the decision of the Court of Appeals below, R. 793, is an error. See 25th Finding of Fact by the District Court. R. 716.

on February 19, 1942, was in accordance with sovereign military orders. R. 718.

At Suva the *Portmar* was ordered by the British Naval Control Officer, with the approval of the local United States Naval commander, to proceed to Sydney, Australia. After arrival at Sydney the *Portmar* was ordered by the Australian Naval Control, with the approval of local officers of the United States Army and Navy, to proceed to various Australian ports and deliver her outward cargo as ordered. The *Portmar* complied with those orders, arriving at said ports on the following dates: Sydney, December 30, 1941; Brisbane, January 5, 1942; Port Darwin, January 19, 1942; Wyndham, February 8, 1942; and back to Port Darwin, February 12, 1942. R. 717-721.

From the time the vessel sailed from San Francisco until January 19, 1942, when petitioner received unofficial information that the *Portmar* was "somewhere in Australia", petitioner did not receive any information and had no knowledge of the position or movements of the *Portmar*. R. 143, 720. The master of the *Portmar* repeatedly tried to notify petitioner of the movements of the vessel but military secrecy and controls prevented any communication. R. 281-282; 284-285; 286; 291-293.

On January 24, 1942, after receiving further information that the *Portmar* was in Australia, petitioner and the war risk underwriters entered into the special agreement shown by the cable message of petitioner's brokers to their London correspondents, dated January 24, 1942 and their reply dated February 6, 1942, quoted *ante* p. 5.

At Wyndham the *Portmar* discharged the last of her outward cargo and pursuant to orders theretofore received, returned without cargo to Port Darwin arriving there on February 12, 1942. R. 721.

Thereupon by orders of the officer commanding the United States Army forces at Darwin, the *Portmar* was directed to take on board a detachment of three to four hundred officers and men of the 148th U. S. Field Artillery with their field guns, military stores, supplies, equipment and ammunition and a motor launch belonging to the Australian Army; and on the night of February 14, 1942 in convoy conference on board the U. S. Cruiser *Houston*, in the presence of and with the approval of the commanding officer of the *Houston*, the Master of the *Portmar* and the Masters of three other merchant vessels received orders from the Australian Naval Control officer to proceed in convoy of the *Houston* and other naval vessels for the port of Koepang, Timor. R. 721-722.

Obeying these orders the *Portmar*, sailed in convoy of the *Houston* and other naval vessels from Port Darwin at 1:30 A. M. on February 15, 1942 carrying the artillery, troops and materiel to aid in the defense of Koepang. R. 722.

On the same day while steaming across Timor Sea, the convoy was attacked by two Japanes planes. The *Portmar* did not sustain any damage in that attack. R. 722.

On February 16, 1942, while still proceeding across Timor Sea, the convoy was attacked by a squadron of Japanese bombers. The *Portmar* sustained some damages in that attack but was nevertheless able to proceed. On orders of the Commander of the *Houston* the convoy returned to Port Darwin and anchored there at 12:55 P. M. on February 18, 1942. R. 723.

The Disaster.

On February 19, 1942 at about 9:55 A. M., Japanese aircraft attacked Port Darwin. Among other casualties SS. *Neptune*, the Destroyers USS. *Perry* and USS. *Preston*,

the United States Army Transport *Meigs*, SS. *Mauna Loa* and a British motor ship were destroyed. R. 309-310; 539-540; 724; 730-731. In that attack, the *Portmar* was riddled and shattered by bomb fragments and aerial gun fire. R. 309-320. The damages sustained by the *Portmar* were so extensive and serious that the Master beached the vessel in order to prevent her from sinking in the deep wafer of the harbor. R. 320; 724.

Notice of Abandonment.

Promptly after receipt of information of the extent of the loss, petitioner, on April 8, 1942, through its brokers, tendered to the war risk underwriters abandonment of its interest in the *Portmar*. On the same date, the tender of abandonment was rejected by the war risk underwriters. R. 587-589.

Underwriters' repudiation of liability.

On January 8, 1943 the war risk underwriters informed Thos. Stephens & Sons, Ltd., London that after careful consideration they declined all liability under the policies, on the ground "that all liability under their policies had terminated prior to the casualty." That repudiation was transmitted to petitioner by letter, initialed by all the respondent underwriters, from Thos. Stephens & Sons, Ltd., London to Mather & Company, Philadelphia, dated January 8, 1943. R. 590-591; 740-741.

The Decisions Below.

The District Court held that petitioner was entitled to recover from the underwriters the insured value of the *Portmar*, $860,000 with sue and labor expenses and the amount expended to satisfy a judgment for salvage award,

all with interest. The District Court held that the policies were in effect at the time of the loss; that the loss was covered by the policies and that the vessel became a constructive total loss within the meaning of the policies by reason of a peril insured against; that petitioner is not precluded from recovery under the policies; that petitioner's tender of abandonment to the war risk underwriters was sufficient. R. 744-756. Final decree was entered on July 20, 1951 in favor of petitioner in the total sum of $1,390,471.05. R. 765-768.

On appeal by respondents, R. 772-776, the United States Court of Appeals for the Second Circuit reversed the decision of the District Court and directed that the libel be dismissed, holding that the voyage ended when the *Portmar* arrived at Brisbane on January 5, 1942, by reason of frustration due to the military dominion and controls then existing under the emergency in Australia, and that the policies then ceased to cover the ship. R. 802.

JURISDICTION

The jurisdiction of this Court to review this case on a writ of certiorari is provided by Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED*

1. Whether war risk underwriters of a cargo vessel, who have issued in the face of impending war a policy covering, among other things, "the risks of war" and "all

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* If this petition is granted, petitioner reserves for submission to this Court the question raised but not decided below, whether underwriters are barred from raising any defense not specified in the repudiation letter of January 8, 1943, *Ohio & M. R. Co.* v. *McCarthy* (1877) 96 U. S. 258, 267-8, and the following questions on the merits which were decided in petitioner's favor by the Dis-